



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

**Digital Commons @ Touro Law
Center**

Scholarly Works

Faculty Scholarship

1986

A Race By Any Other Name: The Interplay Between Ethnicity, National Origin and Race for Purposes of Section 1981

Eileen R. Kaufman
ekaufman@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Civil Rights and Discrimination Commons](#), and the [Constitutional Law Commons](#)

Recommended Citation

28 ARIZ. L. REV. 259 (1986)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

A Race By Any Other Name: The Interplay Between Ethnicity, National Origin and Race for Purposes of Section 1981*

Eileen R. Kaufman**

Section 1981 maintains a prominent place in the constellation of civil rights statutes, affording broad federal remedies against racial discrimination.¹ While the statute remained relatively underutilized in the period between its original enactment in 1866 until 1968,² the past two decades have witnessed a tremendous surge in its popularity. This resulted from Supreme Court decisions holding that the statute prohibits private as well as public forms of discrimination,³ that the statute provides remedies that are independent of other statutory schemes,⁴ and that the statute protects whites as well as non-whites.⁵

An increasingly recurring yet inconsistently resolved issue arising under Section 1981 concerns the racial parameters of the statute. Specifically, the issue is whether claims of ethnic or national origin discrimination constitute racial discrimination within the meaning of the Act. While the Supreme Court has repeatedly referred to the "racial" character of the Act, it has never defined the term racial for purposes of Section 1981.⁶ The issue promises to be addressed and perhaps definitively resolved this term because the Court recently granted certiorari in two cases that determine, in contradictory fashion, what types of discrimination constitute racial discrimination within the meaning of the Act.⁷

* This manuscript of superior quality accepted pursuant to the prompt publication policy of the ARIZONA LAW REVIEW, subject to minimal grammatical and citation form corrections.

** J.D., 1975 New York University. Assistant Professor of Law, Touro College, Jacob D. Fuchsberg Law Center. The author wishes to thank Martin A. Schwartz for his guidance and support. The author also appreciates the efforts of Armando Arroyo who acted as research assistant.

1. 42 U.S.C. § 1981 (1982). See *infra* notes 82-86.

2. Comment, *Developments in the Law-Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29, 33 (1980).

3. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

4. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

5. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

6. *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976); *Georgia v. Rachel*, 384 U.S. 780, 791 (1966).

7. *Al-Khazraji v. St. Francis College*, 784 F.2d 505 (3d Cir. 1986), *cert. granted*, 107 S. Ct. 62 (1986); *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 62 (1986). While in *Shaare Tefila Congregation* the issue arose under § 1982 rather than § 1981, the Supreme court has stated that "there is no reason to construe these sections differently." *Tillman v. Wheaton-Haven Recreational Ass'n*, 410 U.S. 431, 440 (1973). See *infra* text accompanying notes 262-68.

The Third Circuit in *Al-Khazraji v. St. Francis College*,⁸ held that an ethnic Arab, born in Iraq, could claim the protections of Section 1981 even if he could not demonstrate membership in an anthropologically defined racial category. The court reasoned that courts could not be bound by rigid scientific definitions of race because "there is no precise definition of the word"⁹ and because "Congress' purpose [in enacting Section 1981] was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at the least, membership in a group that is ethnically and physiognomically distinctive."¹⁰

In contrast, the Fourth Circuit, in *Shaare Tefila Congregation v. Cobb*,¹¹ held that members of a Jewish congregation who had suffered anti-Semitic discrimination expressed in blatant racial terms could not prevail in a Section 1981 action because they could not demonstrate membership in a racially distinct group. The court rejected plaintiff's argument that the racial character of discrimination had been satisfied by the fact that defendants' actions were based on their strongly, albeit erroneously, held beliefs that Jews constitute a separate and inferior race.¹²

The issue of whether claims of national origin or ethnic discrimination are cognizable under Section 1981 has spawned a dramatic divergence of opinions in the lower federal courts. Plaintiffs seeking protection under the Act have included Syrians,¹³ Indians,¹⁴ Mexican Americans,¹⁵ Iraqis,¹⁶ Iranians,¹⁷ Spanish-surnamed Americans,¹⁸ Hispanics,¹⁹

8. 784 F.2d 505.

9. *Id.* at 516.

10. *Id.* at 517.

11. 785 F.2d 523.

12. *Id.* at 526-27.

13. Syrians: *Abdulrahim v. Gene B. Glick Co.*, 612 F. Supp. 256 (D.C. Ind. 1985).

14. Indians: *Shah v. Mt. Zion Hosp. and Med. Ctr.*, 642 F.2d 268 (9th Cir. 1981); *Shah v. Halliburton*, 627 F.2d 1055 (10th Cir. 1980); *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157 (9th Cir. 1976); *Naraine v. Western Elec. Co.*, 507 F.2d 590 (8th Cir. 1974); *Banker v. Time Chem., Inc.*, 579 F. Supp. 1183 (N.D. Ill. 1983); *Baruah v. Young*, 536 F. Supp. 356 (D. Md. 1982); *Trehan v. IBM Corp.*, 24 Fair Empl. Prac. Cas. (BNA) 443 (S.D.N.Y. 1980); *Patel v. Holley House Hotels*, 483 F. Supp. 374 (S.D. Ala. 1979); *Rajender v. University of Minn.*, 24 Fair. Empl. Prac. Cas. (BNA) 1051 (D. Minn. 1979); *Anandam v. Fort Wayne Community Schools*, 19 Fair. Empl. Prac. Cas. (BNA) 773 (N.D. Ind. 1978); *Jawa v. Fayetteville State Univ.*, 426 F. Supp. 218 (E.D.N.C. 1976); *Sud v. Import Motors Limited Inc.*, 379 F. Supp. 1064 (W.D. Mich. 1974).

15. Mexican Americans: *Gomez v. Great Lakes Steel Div.*, 803 F.2d 250 (6th Cir. 1986); *Erebia v. Chrysler Plastic Products Corp.*, 772 F.2d 1250 (6th Cir. 1985); *Garcia v. Rush-Presbyterian-St. Lukes Medical Center*, 660 F.2d 1217 (7th Cir. 1981); *Garcia v. Alton V.W. Gloor*, 618 F.2d 264 (5th Cir. 1980); *Gonzalez v. Stanford Applied Eng'g*, 597 F.2d 1298 (9th Cir. 1979); *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir.), *vacated as moot*, 440 U.S. 625 (1977); *Sabala v. Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975); *Madrigal v. Certaineed Corp.*, 508 F. Supp. 310 (W.D. Mo. 1981); *LaFore v. Emblem Tape and Label Co.*, 448 F. Supp. 824 (D. Colo. 1978); *Cervantes v. Dobson Brothers Constr. Co.*, 19 Empl. Prac. Dec. (CCH) ¶8979 (D. Neb. 1978); *Vazquez v. Werner Continental Inc.*, 429 F. Supp. 513 (N.D. Ill. 1977); *Gomez v. Pima County*, 426 F. Supp. 816 (D. Ariz. 1976); *Gradillas v. Hughes Aircraft Co.*, 407 F. Supp. 865 (D. Ariz. 1975); *Baca v. Butz*, 394 F. Supp. 888 (D.N.M. 1975).

16. Iraqis: *Al-Khazraji v. Saint Francis College*, 784 F.2d 505 (3d Cir. 1986), *cert. granted*, 107 S. Ct. 62 (1986); *Anooya v. Hilton Hotels Corp.*, 733 F.2d 48 (7th Cir. 1984).

17. Iranis: *Alizadeh v. Safeway Stores, Inc.*, 802 F.2d 111 (5th Cir. 1986); *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365 (D.N.M. 1980).

18. Spanish-surnamed Americans: *National Ass'n of Gov't Employees v. Rumsfeld*, 556 F.2d 76 (D.C. Cir. 1977); *Apodaca v. General Electric Co.*, 445 F. Supp. 821 (D.N.M. 1978); *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1 (E.D. Pa. 1975).

19. Hispanics: *Cervantes v. IMCO Halliburton Services*, 724 F.2d 511 (5th Cir. 1984); *Davis v.*

Slavics,²⁰ Italians,²¹ Chinese born naturalized Americans,²² Cubans,²³ Puerto Ricans,²⁴ Ukrainians,²⁵ Jews,²⁶ Israelis,²⁷ Pakistani-Americans,²⁸ Spanish-surnamed Maylays,²⁹ Hebrews from Palestine,³⁰ Egyptians,³¹ Arabians,³² Ethiopians,³³ and Koreans.³⁴

This Article examines the history of Section 1981, explores the sociological and anthropological underpinnings of the concept of race, and analyzes the widely disparate decisions that this issue has generated in an effort to determine what types of discrimination are properly cognizable under the Act.

INTRODUCTION

Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all

Boyle Midway, Inc., 615 F. Supp. 560 (N.D. Ga. 1985); Ramos v. Flagship Intern., Inc., 612 F. Supp. 148 (E.D.N.Y. 1985); Garza v. Deaf Smith County, 604 F. Supp. 46 (N.D. Texas 1984); Garcia v. Gardners Nurseries, 585 F. Supp. 369 (D. Conn. 1984); Pollard v. City of Hartford, 539 F. Supp. 1156 (D. Conn. 1982); Carrillo v. Illinois Bell Tel. Co., 538 F. Supp. 793 (N.D. Del. 1982); Badillo v. Central Steel & Wire Co., 89 F.R.D. 140 (N.D. Ill. 1981); Aponte v. National Steel Service Center, 500 F. Supp. 198 (N.D. Ill. 1980); Ridgeway v. International Bhd. of Elec. Workers, 466 F. Supp. 595 (N.D. Ill. 1979); Martinez v. Bethlehem Steel Corp., 78 F.R.D. 125 (E.D. Pa. 1978); Plummer v. Chicago Journeymen Plumbers, 452 F. Supp. 1127 (N.D. Ill. 1978), *rev'd on other grounds*, 657 F.2d 890 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); Martinez v. Hazelton Research Animals, 430 F. Supp. 186 (D. Md. 1977); Enriquez v. Honeywell, 431 F. Supp. 901 (W.D. Okla. 1977); Ortega v. Merit Ins. Co., 433 F. Supp. 135 (N.D. Ill. 1977); Puerto Rican Council v. Metromedia, 10 Fair Empl. Prac. Cas. (BNA) 1009 (S.D.N.Y. 1975); Miranda v. Clothing Workers Local 208, 10 Fair Empl. Prac. Cas. (BNA) 557 (D.N.J. 1974).

20. Slavics: Budinsky v. Corning Glass Works, 425 F. Supp. 786 (W.D. Pa. 1977); Sokolski v. Corning Glass Works, 14 Fair Empl. Prac. Cas. (BNA) 936 (W.D. Pa. 1977).

21. Italians: Ricci v. Key Bancshares of Me., Inc., 768 F.2d 456, 467 (1st Cir. 1985); Cariddi v. Kansas City Chiefs Football Club, 568 F.2d 87 (8th Cir. 1977); Petrone v. City of Reading, 541 F. Supp. 735 (E.D. Pa. 1982).

22. Chinese: Cheng v. GAF Corp., 566 F. Supp. 350 (S.D.N.Y. 1982), *rev'd*, 713 F.2d 886 (2d Cir. 1983).

23. Cubans: Torres v. Gianni Furniture Co., No. 85C9924, slip op. (N.D. Ill. June 4, 1986); Cubas v. Rapid Am. Corp., 420 F. Supp. 663 (E.D. Pa. 1976).

24. Puerto Ricans: Rodriguez v. Chandler, 641 F. Supp. 1292 (S.D.N.Y. 1986). Garcia v. Gardners Nurseries, 585 F. Supp. 369 (D. Conn. 1984); Ortiz v. Bank of Am., 547 F. Supp. 550 (E.D. Cal. 1982); Vera v. Bethlehem Steel Corp., 448 F. Supp. 610 (M.D. Pa. 1978); Maldonado v. Broadcast Plaza, 10 Fair Empl. Prac. Cas. (BNA) 839 (D. Conn. 1974); Miranda v. Clothing Workers Local 208, 10 Fair Empl. Prac. Cas. (BNA) 557 (D.N.J. 1974).

25. Ukrainians: Kurylas v. U.S. Dept. of Agriculture, 514 F.2d 894 (D.C. Cir. 1975); Hiduchenko v. Minneapolis Medical & Diagnostic Center, 467 F. Supp. 103 (D. Minn. 1979).

26. Jews: Shaare Tefila Cong. v. Cobb, 785 F.2d 523 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 62 (1986).

27. Israelis: Ben-Yakir v. Gaylinn Assoc., 535 F. Supp. 543 (S.D.N.Y. 1982).

28. Pakistani-Americans: Khawaja v. Wyatt, 494 F. Supp. 302 (W.D.N.Y. 1980).

29. Spanish-surnamed Maylays: Lopez v. Sears Roebuck & Co., 493 F. Supp. 801 (D. Md. 1980).

30. Hebrew from Palestine: Wald v. Teamsters, 24 Fair Empl. Prac. Cas. (BNA) 616 (C.D. Cal. 1980).

31. Egyptians: Ibrahim v. N.Y. Dept. of Health, 581 F. Supp. 228 (E.D.N.Y. 1984).

32. Arabian: Saad v. Burns Int'l Sec. Serv., 456 F. Supp. 33 (D.D.C. 1978).

33. Black Grievance Comm. v. Philadelphia Elec. Co., 36 Empl. Prac. Dec. (CCH) ¶35,108 (E.D. Pa. Dec. 21, 1984).

34. Doe v. St. Joseph's Hosp., 788 F.2d 411 (7th Cir. 1986).

laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, gains, penalties, taxes, licenses, and exactions of every kind, and to no other.³⁵

While the statute has been used primarily to combat discrimination in the making and enforcement of contracts, particularly in the employment context, there are actually four separate interests protected in the Act. First and foremost is the contract clause which states that "All persons . . . shall have the same right . . . to make and enforce contracts. . . ."³⁶ Next, the evidence clause guarantees the right "to sue, be parties, [and] give evidence."³⁷ Third is the equal benefits clause which guarantees the right to the "full and equal benefit of all laws and proceedings for the security of persons and property."³⁸ Finally, the like punishment clause guarantees the right to "like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."³⁹

The contract clause of Section 1981 is tremendously significant because it has been construed very broadly to cover private as well as governmental action.⁴⁰ In addition, the clause has been construed to confer a federal remedy for employment discrimination, independent of Title VII of the Civil Rights Act of 1964.⁴¹ The contract clause has also been relied on by plaintiff's claiming discrimination involving property and housing,⁴² private schools⁴³ and private clubs.⁴⁴

The remaining three substantive clauses have not been widely utilized and remain subject to conflicting interpretations, with some courts holding that state action is required under one or more of the clauses.⁴⁵ The evidence clause has been used in cases claiming private retaliation against an

35. 42 U.S.C. § 1981 (1982).

36. 42 U.S.C. § 1981 (1982). The Supreme Court has stated that § 1981 "relates primarily to racial discrimination in the making and enforcement of contracts." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975).

37. 42 U.S.C. § 1981 (1982).

38. *Id.*

39. *Id.*

40. *Runyon v. McCrary*, 427 U.S. 160 (1976).

41. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

42. These cases typically involve claims asserted under 42 U.S.C. §§ 1981 and 1982 (1982). *See, e.g., Lee v. Southern Home Sites Corp.*, 429 F.2d 290 (5th Cir. 1970).

43. *Runyon v. McCrary*, 427 U.S. 160 (1976).

44. The Supreme Court has not decided whether the private exemption of § 201 of Title II of the Civil Rights Act of 1964 or the private club exemption of Title VII of the Civil Rights Act of 1964 applies to § 1981 claims. The Court specifically reserved the question in *Tillman v. Wheaton-Haven Recreational Ass'n*, 410 U.S. 431 (1973). A number of lower federal courts have applied the private club exemption to § 1981. *See Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182 (D. Conn. 1974); *Wright v. Salisbury Club, Ltd.*, 479 F. Supp. 378 (E.D. Va. 1979), *rev'd on other grounds*, 632 F.2d 309 (4th Cir. 1980); *Hudson v. Charlotte Country Club*, 535 F. Supp. 313 (W.D.N.C. 1982); *Kemerer v. Davis*, 520 F. Supp. 256 (E.D. Mich. 1981). *See also Olzman v. Lake Hills Swim Club*, 495 F.2d 1333, 1336 (2d Cir. 1974).

45. *See Shaare Tefila Congregation v. Cobb*, 785 F.2d 523 (4th Cir. 1986) (The equal benefit clause requires state action), *cert. granted*, 107 S. Ct. 62 (1986); *Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977) (Unlike the contract clause which embraces private acts of discrimination, the equal benefit clause and the like punishment clause require state action), *cert. denied*, 438 U.S. 904 (1978). *But see Hawk v. Perillo*, 642 F. Supp. 380, 390 (N.D. Ill. 1986) (State action is not required under § 1981 whether the claim is asserted under the contract clause, the equal benefit clause, or the like punishment clause).

employee who has filed a race discrimination suit and in cases claiming racially motivated retaliation against an employee who files a work-related charge.⁴⁶ The equal benefits clause has been utilized in a broad range of cases including claims of police misconduct,⁴⁷ claims relating to the full and equal enjoyment of public property and services,⁴⁸ claims for government benefits,⁴⁹ and claims involving freedom of association.⁵⁰ Finally, the like punishment clause has been relied on in claims involving licenses, prison conditions and police misconduct.⁵¹

The parameters of Section 1981 have been explored in several Supreme Court rulings.⁵² Significantly, the Court has held that the statute applies to private action⁵³ as well as to state action⁵⁴ and that Section 1981, like the fourteenth amendment, requires proof of intentional discrimination.⁵⁵ While the United States Supreme Court has not yet resolved the issue of whether claims of national origin or ethnic discrimination are cognizable under the Act,⁵⁶ the Court has repeatedly characterized the scope of protection as "racial" in character.⁵⁷ And despite the fact that Section 1981 was generated principally by a desire to abolish the Black Codes and to outlaw private discrimination against blacks, the Supreme Court has squarely held that the purpose of the Act was sufficiently broad in scope to encompass

46. See generally Comment, *Developments in the Law-Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29, 121-29 (1980).

47. *Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978).

48. *Jennings v. Patterson*, 488 F.2d 436 (5th Cir. 1976).

49. *Graham v. Richardson*, 403 U.S. 365 (1971).

50. See Comment, *supra* note 46, at 140-49.

51. *Id.* at 149-60.

52. *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). See also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

53. *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

54. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419-20 (1948); *Runyon v. McCrary*, 427 U.S. 160 (1976).

55. *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982); *Washington v. Simpson*, 806 F.2d 192, 197 (8th Cir. 1986); *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145, 1147 (4th Cir. 1986); *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1074 (9th Cir. 1986); *Minority Police Officer's Ass'n v. South Bend*, 801 F.2d 964 (7th Cir. 1986); *Stoner v. L.A. Community College Dist.*, 796 F.2d 270 (9th Cir. 1986); *Krulik v. Board of Educ. of New York*, 781 F.2d 15 (2d Cir. 1986).

56. In 1980, the Court specifically declined to resolve the issue. *Delaware State College v. Ricks*, 449 U.S. 250, 256 n.6 (1980). It is expected that the Supreme Court will address the issue in the 1986-1987 term in light of the fact that the Court recently granted certiorari in two cases raising the issue. *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 62 (1986); *Al-Khazraji v. St. Francis College*, 784 F.2d 505 (3d Cir. 1986), *cert. granted*, 107 S. Ct. 62 (1986).

57. *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Georgia v. Rachel*, 384 U.S. 780, 791 (1966). Thus, § 1981 has been held not to apply to discrimination based on economic views, *Daigle v. Gulf State Util. Co.*, Local No. 2286, 794 F.2d 974 (5th Cir. 1986), nor to discrimination based on gender, *Runyon v. McCrary*, 427 U.S. 160 (1976); *Williams v. San Francisco Unified School Dist.*, 340 F. Supp. 438 (N.D. Cal. 1972); *Fitzgerald v. United Methodist Community Center*, 335 F. Supp. 965 (D. Neb. 1972); *League of Academic Women v. Regents of Univ. of Cal.*, 343 F. Supp. 636 (N.D. Cal. 1972); *Bobo v. ITT, Continental Baking Co.*, 662 F.2d 340 (5th Cir. 1981), *cert. denied*, 456 U.S. 933 (1982), nor to discrimination against the non-disadvantaged, *Foremen v. General Motors Corp.*, 473 F. Supp. 166 (E.D. Mich. 1979), nor to discrimination based on religion, *Runyon v. McCrary*, 427 U.S. 160 (1976).

governmental discrimination against aliens⁵⁸ and to protect whites as well as blacks.⁵⁹

The issue of whether claims of national origin or ethnic discrimination are cognizable under Section 1981 has generated widely disparate decisions in the lower federal courts. The decisions run the gamut from equating national origin discrimination with racial discrimination,⁶⁰ to requiring that plaintiff prove that the claim of national origin discrimination is actually based on racial grounds,⁶¹ to requiring that plaintiff prove that he or she belongs to a scientifically recognized and anthropologically classified "race"⁶² and to requiring that plaintiff demonstrate membership in an ethnically and physiognomically distinct group.⁶³

Despite these variations, the lower court opinions can be analyzed in two major groupings. One approach categorically holds that Section 1981 does not extend to national origin discrimination.⁶⁴ A sub-category of this group places the burden of proof on the plaintiff to demonstrate that the discrimination was racial and not a function of national origin.⁶⁵ The second line of cases looks to the reasons underlying Section 1981 and applies its protection to plaintiffs who are discriminated against because they are perceived by others to be different than whites.⁶⁶

The inconsistencies in the decisions stem in large part from the fact that the Supreme Court, while consistently construing section 1981 as covering "racial" discrimination, has never defined the term "race."⁶⁷ An analysis of the lower federal court decisions that have grappled with this issue reveals a clear split as to whether Section 1981 should be interpreted narrowly to protect against discrimination based on rigid anthropological classifications of race or interpreted broadly to encompass claims of national origin discrimination by individuals who, while lacking geneological or phenotypical race

58. The Supreme Court has held that § 1981 is applicable to claims of discrimination against aliens, at least in cases involving state action. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419, n.7 (1948); *Graham v. Richardson*, 403 U.S. 365, 377-78 (1971). Indeed, the 1870 amendment of § 1 of the Civil Rights Act was intended to broaden the statute's scope of coverage to include aliens. *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974). It is unclear whether purely private acts of discrimination against aliens are cognizable under § 1981. Compare *Espinoza v. Hillwood Square Mut. Ass'n*, 522 F. Supp. 559 (E.D. Va. 1981) where the court held that private acts of discrimination against aliens are within the purview of the statute, with *Ben-Yakir v. Gaylinn Assocs., Inc.*, 535 F. Supp. 543 (S.D.N.Y. 1982) and *DeMalherbe v. International Union of Elevator Constrs.*, 438 F. Supp. 1121 (N.D. Cal. 1977) holding that the Act does not reach private acts of discrimination against aliens.

59. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

60. *LaFore v. Emblem Tape and Label Co.*, 448 F. Supp. 824 (D. Colo. 1978).

61. *Bullard v. OMI Georgia Inc.*, 640 F.2d 632 (5th Cir. 1981); *Abdulrahim v. Gene B. Glick Co.*, 612 F. Supp. 256 (D.C. Ind. 1985); *Pollard v. City of Hartford*, 539 F. Supp. 1156 (D. Conn. 1982).

62. *Ibrahim v. NYS Dept. of Health*, 581 F. Supp. 228 (E.D.N.Y. 1984).

63. *Al-Khazraji v. St. Francis College*, 784 F.2d 505 (3rd Cir. 1986), *cert. granted*, 107 S. Ct. 62 (1986); *Alizadeh v. Safeway Stores, Inc.*, 802 F.2d 111 (5th Cir. 1986).

64. See *infra* notes 175-83. See also *Chaiffetz v. Robertson Research Holding, Ltd.*, 798 F.2d 731 (5th Cir. 1986); *Torres v. Gianni Furniture Co.*, No. 85C9924, slip op. (N.D. Ill. June 5, 1986).

65. See *infra* notes 184-88.

66. See *infra* notes 190-206, 212.

67. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976); *Johnson v. Railway Express*, 421 U.S. 454, 459-60 (1975); *Jones v. Alfred H. Mayer*, 392 U.S. 409, 413 (1968); *Georgia v. Rachel*, 384 U.S. 780, 791 (1966).

characteristics, have been subjected to invidious discrimination because of their ethnic background.

THE SIGNIFICANCE OF ASSERTING A CLAIM UNDER SECTION 1981

Whether claims of national origin or ethnic discrimination are properly cognizable under Section 1981 has significant consequences. While other statutes such as Title VII of the Civil Rights Act of 1964 clearly and unambiguously encompass claims of national origin discrimination, there are a variety of significant procedural and substantive differences. These differences relate not only to the breadth of each statute's substantive coverage, but also to issues involving the applicable statute of limitations, the necessity of exhausting administrative remedies, the plaintiff's entitlement to a jury trial, and the nature and magnitude of the available remedies.

Section 703 of Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin."⁶⁸ Despite the fact that Title VII clearly prohibits discrimination in employment on the basis of national origin, the statute is more limited than Section 1981 in several respects. First, its scope of protection is limited to discrimination in employment only.⁶⁹ Second, its coverage, even in the realm of employment discrimination, is limited in that it excludes employers with fourteen or fewer employees,⁷⁰ private membership clubs,⁷¹ religious associations,⁷² the employment of individuals performing educational functions for educational facilities,⁷³ and Indian tribes.⁷⁴

In addition to its more narrow scope of coverage, Title VII requires compliance with detailed procedural requirements which are not prerequisites to the filing of a Section 1981 action.⁷⁵ Under Title VII, a claimant must file a charge with the Equal Employment Opportunities Commission within either 180 or 300 days of the discriminatory act.⁷⁶ If the claimant resides in a jurisdiction with a state or local fair employment practices agency, the claimant must first file the charge with that agency, which has

68. 42 U.S.C. § 2000e-2(a)(1) (1982). Similar protections have been extended to federal employees. See 42 U.S.C. § 2000e-16 (1982). Congress has declared that "it is the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of . . . national origin. . ." 5 U.S.C. § 7201(b) (1982). See also *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

69. See generally Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. C.R.-C.L. L. REV. 56 (1972).

70. 42 U.S.C. § 2000e(b) (1982); See *Davis v. West Community Hospital*, 786 F.2d 677 (5th Cir. 1986) where the Title VII claim was dismissed because the employer lacked the requisite number of employees. Recovery was awarded, however, under § 1981.

71. 42 U.S.C. § 2000e(b)(2) (1982).

72. 42 U.S.C. § 2000e-1 (1982).

73. *Id.*

74. 42 U.S.C. § 2000e(b)(1) (1982). According to Senator Humphrey in a report prepared in 1964 when the statute excluded the federal government and employers with fewer than twenty-four employees, the exclusions covered 92% of all employers and 60% of all employees in the United States. 110 CONG. REC. 13090 (1964).

75. See *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).

76. 42 U.S.C. § 2000e-5(e) (1982). The time periods differ depending on whether or not there is a state or local fair employment practices agency authorized to hear the complaint.

sixty days to act.⁷⁷ The claimant then proceeds to the Equal Employment Opportunities Commission for investigation and possible conciliation.⁷⁸ Any federal court action must be filed within ninety days of receipt of the right to sue letter from the EEOC.⁷⁹

In sharp contrast, Section 1981 does not require exhaustion of administrative remedies but rather provides direct access to the federal district courts.⁸⁰ And, while it is currently unclear what statute of limitations governs Section 1981 actions,⁸¹ it is clearly longer than the applicable limitations period under Title VII.

An additional advantage to an aggrieved employee suing under Section 1981, which is not available under Title VII, is that the former statute provides both legal and equitable remedies whereas Title VII is limited to equitable relief. Thus, a Section 1981 plaintiff can assert a legal claim for compensatory and punitive damages⁸² and be entitled to a trial by jury.⁸³ A similar claim for backpay under Title VII is typically seen as incident to the equitable claim for reinstatement and does not result in a right to a jury trial.⁸⁴

Moreover, the scope of available relief is more limited under Title VII

77. 42 U.S.C. § 2000e-5(c) (1982).

78. 42 U.S.C. § 2000e-5(f) (1982).

79. 42 U.S.C. § 2000e-5(e) (1982). For federal employees, the suit must be filed in federal court within thirty days of final action by the Equal Employment Opportunities Commission or after 180 days elapse from the filing of the administrative complaint if there is no final agency action.

80. See *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975); *Kornegay v. Burlington Indus., Inc.*, 803 F.2d 787, 788 (4th Cir. 1986); *Cheyney State College Faculty v. Hufstедler*, 703 F.2d 732 (3d Cir. 1983); *Young v. International Tel. and Tel. Co.*, 438 F.2d 757 (3d Cir. 1971); *Curry v. United States Post Office*, 599 F. Supp. 506 (E.D. Mich. 1984); *Grant v. Morgan Guar. Trust Co.*, 548 F. Supp. 1189 (S.D.N.Y. 1982).

81. Section 1988 of Title 42 of the United States Code directs the federal courts to apply state law whenever federal law is "deficient", as long as state law "is not inconsistent with the Constitution and laws of the United States." 42 U.S.C. § 1988 (1982). Since there is no statute of limitations governing these actions, § 1988 has been employed to determine the appropriate statute of limitations in civil rights actions, with little uniformity of result. In 1985, the Supreme Court held that the appropriate state statute of limitations to borrow in § 1983 cases is the statute of limitations governing personal injury actions. *Wilson v. Garcia*, 105 S. Ct. 1938 (1985). But, while the issue has been resolved for purposes of § 1983, the Court has not expressly held which limitations period governs § 1981 claims. See *Jones v. Bechtel*, 788 F.2d 571 (9th Cir. 1986). See also *Runyon v. McCrary*, 427 U.S. 160 (1976); *Banks v. Chesapeake and Potomac Tel. Co.*, 802 F.2d 1416 (D.C. Cir. 1986). Significantly, in *Al-Khazraji v. St. Francis College*, 784 F.2d 505 (3rd Cir. 1986), *cert. granted*, 107 S. Ct. 62 (1986), plaintiff's Title VII claim was dismissed for failure to comply with that statute's rigid time limitations. The case was not dismissed, however, because plaintiff was able to pursue his § 1981 claim which was not time barred.

82. See *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975). See also *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727 (9th Cir. 1986); *Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508 (7th Cir. 1986) (Punitive damages are to be assessed pursuant to the standard articulated by the Supreme Court in *Smith v. Wade*, 461 U.S. 30 (1983), a § 1983 case); *Thomas v. Resort Health Related Facility*, 539 F. Supp. 630 (E.D.N.Y. 1982) (A § 1981 plaintiff can recover damages to compensate for emotional injuries resulting from the discrimination).

83. *Lincoln v. Board of Regents of Univ. System*, 697 F.2d 928 (11th Cir.), *reh'g denied*, 705 F.2d 471, *cert. denied*, 464 U.S. 826 (1983); *Williams v. Owens-Illinois*, 665 F.2d 918 (9th Cir.), *cert. denied*, 459 U.S. 971 (1982); *Johnson v. Wolff's Clothier's Inc.*, 663 F.2d 800 (8th Cir. 1981); *Bibbs v. Jim Lynch Cadillac Inc.*, 653 F.2d 316, 318-19 (8th Cir. 1981); *Setser v. Novack Inv. Co.*, 638 F.2d 1137, 1142 (8th Cir.), *other portions of opinion amended en banc*, 657 F.2d 962 (8th Cir. 1981); *Sisco v. J.S. Aberici Constr. Co.*, 655 F.2d 146, 149-50 (8th Cir. 1981); *Moore v. Sun Oil of Pa.*, 636 F.2d 154 (6th Cir. 1980); *Thomas v. Resort Health Related Facility*, 539 F. Supp. 630 (E.D.N.Y. 1982).

84. See, e.g., *Lincoln v. Board of Regents of Univ. System*, 697 F.2d 928 (11th Cir.), *cert.*

than Section 1981. Under Title VII, an award of backpay is limited to a period of two years, while there is no durational limit under Section 1981 other than one imposed by virtue of a statute of limitations.⁸⁵ Finally, Title VII does not authorize awards of punitive damages whereas such damages have been awarded under Section 1981.⁸⁶

Significantly, the Supreme Court has held that Section 1981 and Title VII were meant to augment one another and are not mutually exclusive.⁸⁷ While similar, the two statutes are not coextensive, either in coverage or in remedies. Thus, a plaintiff may claim discrimination under Section 1981 and not be bound by the severe time constraints imposed under Title VII, nor be subject to Title VII's exhaustion requirements, nor be denied the right to trial by jury if compensatory damages are sought, nor be limited in the amount or type of damages recovered.

It should also be obvious that the equal protection clause of the fourteenth amendment does not obviate the need for protection under Section 1981. Like Title VII, the equal protection clause does protect against discrimination on the basis of national origin. In fact, the Supreme Court has repeatedly stated that discrimination based on national origin is akin to racial discrimination and is subject to the most exacting judicial scrutiny.⁸⁸ While this heightened level of judicial review has resulted in the invalidation of a number of state statutes under the equal protection clause, it provides absolutely no protection against private discrimination. Thus, in the absence of state action, a claimant victimized by even the most blatant national origin discrimination may not seek redress under the equal protection clause. That same victim may sue under Section 1981, if that statute is construed to cover claims of national origin discrimination.

denied, 464 U.S. 826 (1983); *Williams v. Owens-Illinois*, 665 F.2d 918 (9th Cir.), *cert. denied*, 459 U.S. 971 (1982).

85. 42 U.S.C. § 2000e-5(g) (1982). *See Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *Kornegay v. Burlington Indus., Inc.*, 803 F.2d 787, 788 (4th Cir. 1986).

86. *See Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975); *Walters v. City of Atlanta*, 803 F.2d 1135, 1146-48 (11th Cir. 1986); *Yarborough v. Tower Oldsmobile, Inc.*, 789 F.2d 508 (7th Cir. 1986).

87. *See Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). The Court noted that in 1972 the Senate rejected an amendment that would have deprived Title VII claimants of the right to sue under § 1981. *But see Brown v. General Servs. Admin.*, 425 U.S. 820 (1976) where the Supreme Court held that Title VII provides the exclusive remedy for employment discrimination by the federal government.

88. *See City of Cleburne, Texas v. Cleburne Living Center*, 105 S. Ct. 3249, 3255 (1985); *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1979); *Trimble v. Gordon*, 430 U.S. 762, 777, 780 (1977) (Rehnquist, J., dissenting); *Castaneda v. Partida*, 430 U.S. 482 (1977); *Keyes v. School District #1, Denver, Colorado*, 413 U.S. 189, 197 (1972); *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Hernandez v. Texas*, 347 U.S. 475, 478-79 (1954); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419-20 (1948); *Korematsu v. United States*, 323 U.S. 214 (1944); *Oyama v. California*, 332 U.S. 633 (1948); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *Truax v. Raich*, 239 U.S. 33, 41 (1915); *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 374 (1886). *See also Benson v. Arizona State Bd.*, 673 F.2d 272, 277-78 n.14 (9th Cir. 1984); *Sorebral-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983); *Cisneros v. Corpus Christi Indep. School Dist.*, 467 F.2d 142 (5th Cir. 1972) (en banc); *United States v. Texas Educ. Agency*, 467 F.2d 848 (5th Cir. 1971) (en banc); *Valadez v. Graham*, 474 F. Supp. 149 (M.D. Fla. 1979); *Wayne State University v. Cleland*, 473 F. Supp. 8 (E.D. Mich. 1979); *Deerfield Hutterian Ass'n. v. Ipswich Bd. of Educ.*, 468 F. Supp. 1219 (D.S.D. 1979); *Meloon v. Helgemoe*, 436 F. Supp. 528 (D.N.H. 1977), *aff'd*, 564 F.2d 602, *cert. denied*, 436 U.S. 950; *United States v. Cammisano*, 413 F. Supp. 886, 891 n.5 (W.D. Mo. 1976), *vacated and remanded*, 546 F.2d 238, *on remand*, 433 F. Supp. 964 (1977).

In light of the significant advantages that inure to a plaintiff asserting a claim under Section 1981 as opposed to Title VII or the equal protection clause of the fourteenth amendment, the issue of whether claims of national origin discrimination are properly cognizable under Section 1981 clearly carries grave consequences for the victims of such discrimination.

LEGISLATIVE HISTORY OF CIVIL RIGHTS ACT OF 1866

A review of the legislative history of the 1866 Act supports an expansive view of the scope of protection afforded by Section 1981. Indeed, one court has commented that "the statute's language is of extraordinary breadth. It does not speak in terms of race, religion or nationality but, on the contrary, speaks of 'all persons.' It is hard to imagine what broader language the Congress could have adopted."⁸⁹

Section 1981 originated in Section 1 of the Civil Rights Act of 1866 which was enacted shortly after the thirteenth amendment was ratified.⁹⁰ The purpose of the Civil Rights Act was to make the protections of the thirteenth amendment "permanent, truly countrywide and inclusive of all races."⁹¹ The statute was targeted primarily at the Black Codes which were enacted in the south immediately after the Civil War and which denied a whole panoply of rights to the recently freed slaves.⁹² In fact, the Codes operated to perpetuate a system of quasi-slavery which bears unmistakable similarities to modern laws in effect in South Africa. Examples of the discrimination sanctioned by the Black Codes which have been characterized as creating "a kind of twilight zone between slavery and freedom"⁹³ include Mississippi laws which imposed restrictions on the movement of blacks, requiring them to carry "passes";⁹⁴ South Carolina laws which imposed criminal penalties on black or white individuals engaged in educating former slaves,⁹⁵ and penalties on blacks acting as ministers;⁹⁶ and Louisiana laws which prohibited blacks from leaving their place of employment without permission, prohibited blacks from renting houses within certain areas, and barred blacks from congregating after dark.⁹⁷ The Black Codes were "nearly as iniquitous as the old slave codes" and were designed to restrict and control blacks "to insure an adequate and cheap labor supply for the plantations."⁹⁸

The Act was originally introduced as the Civil Rights Bill, Senate Bill No. 61, on January 5, 1866, by Senator Trumbull, who described it as a bill that would apply to "every race and color" and would "protect *all persons* in

89. *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 553 (E.D. Cal. 1982).

90. J. TEN BROEK, *EQUAL UNDER LAW* 177 (1965).

91. *Id.* at 179; Cong. Globe, 39th Congress, 1st Sess. 438 (1866).

92. Cong. Globe, 39th Congress, 1st Sess. 744 (1866).

93. K. STAMPP, *THE ERA OF RECONSTRUCTION* 79 (1965).

94. Cong. Globe, 39th Cong., 1st Sess. 603 (1866).

95. See K. STAMPP, *supra* note 93, at 80.

96. *Id.*

97. Senate Executive Document no. 2, 39th Cong., 1st Sess. 93, reprinted in *DOCUMENTARY HISTORY OF RECONSTRUCTION* (Fleming ed. 1960).

98. D. BELL, *RACE, RACISM AND AMERICAN LAW* 31-32 (1980).

the United States in their civil rights. . . ."⁹⁹ Senator Trumbull initially described the bill as designed "to enlarge the powers of the Freedmen's Bureau so as to secure freedom to all persons within the United States and protect every individual in the full enjoyment of the rights of person and property and furnish him with means of their vindication."¹⁰⁰ Senator Howard described the statute's purpose as giving "to persons who are of different races or colors the same civil rights."¹⁰¹ In presenting the bill in the House, Representative Wilson stated that it would "protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men."¹⁰² Finally, Representative Bingham explained that the purpose of the Act was to provide protection, not just to the newly freed slaves, but to "the alien and stranger," to "refugees . . . and all men."¹⁰³

The breadth of the proposed statute led to an amendment which limited the rights protected to those "enjoyed by white citizens."¹⁰⁴ This amendment, proposed by Representative Wilson, Chairman of the Judiciary Committee and floor manager of the bill in the House, and accepted without debate, was designed to insure that women and minors were not covered.¹⁰⁵ The Supreme Court has noted that the phrase was added "to emphasize the racial character of the rights being protected."¹⁰⁶ It was not intended to "limit its application to nonwhite persons."¹⁰⁷

Further light is shed on the scope of the protected rights by the comments of Representative Shallabarger:

[The purpose is] . . . to require that whatever rights as to each of those enumerated civil . . . matters the States may confer upon one race or color of the citizens shall be held by all races in equality. Your state may deprive women of the right to sue or contract, or testify, and children from doing the same. But if they do so, or do not do so as to one race, you shall treat the other likewise . . . It secures-not to all citizens, but to all races as races who are citizens-equality of protection in those enumerated civil rights which the States may deem proper to confer upon any races.¹⁰⁸

These comments certainly do not imply any reliance on "race" or "color" in any anthropological sense. The contrary intent is evidenced in the following comments of Representative Shallabarger:

Who will say that Ohio can pass a law enacting that no man of the *German race*, and whom the United States has made a citizen of the United States, shall ever own any property in Ohio, or shall ever make a contract in Ohio . . . If Ohio may pass such a law, and exclude a

99. Cong. Globe, 39th Congress, 1st Sess. 211 (1866)(emphasis added).

100. *Id.*

101. *Id.* at 504.

102. *Id.* at 1118.

103. *Id.* at 1292.

104. *Id.* at 474.

105. *Id.* AT APP. 157.

106. *Georgia v. Rachel*, 384 U.S. 780, 791 (1966).

107. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 293 (1976).

108. Cong. Globe, 39th Cong., 1st Sess. 1293 (1866).

German Citizen, not because he is a bad man or has been guilty of a crime, but *because he is of the German nationality or race*, then may every other state do so; and you have the spectacle of an American Citizen admitted to all its high privileges and entitled to the protection of his Government in each of these rights, and bound to surrender life and property for its defense, and yet that citizen is not entitled to either contract, inherit, own property, work or live upon a single spot of the Republic, nor to breathe its air.¹⁰⁹

The legislative history is replete with references to the broad scope of the protection contemplated by the Act. The Supreme Court has thus accurately concluded that "the statutory structure and legislative history persuade . . . that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves."¹¹⁰

While the passage of the Civil Rights Act was undeniably triggered by Congressional concern about the plight of the recently freed slaves, it is equally clear that the statute was not confined to protecting blacks.¹¹¹ Rather, as originally drafted, the statute covered "the inhabitants of any state or territory in the United States"¹¹² and, as the Supreme Court squarely held in 1976, was intended to cover whites as well as blacks.¹¹³

Many of the same Congressional concerns that led to the passage of the Civil Rights Act of 1866 were later reflected in the adoption of the fourteenth amendment which was enacted to resolve any doubts about Congress' authority to enact the Civil Rights Act,¹¹⁴ and to provide long term effect to the principles of the 1866 Act by protecting that Act from the whims of subsequent Congressional majorities.¹¹⁵ The 39th Congress was clearly concerned that if the Democrats came to power the Civil Rights Act would be repealed.¹¹⁶ Representative James A. Garfield of Ohio, who was later to serve as the twentieth President of the United States, explained:

The Civil Rights Bill is now a part of the law of the land. But every gentleman knows that it will cease to be a part of the law whenever the sad moment arises when that gentleman's [Mr. Finck] party comes to power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm or passion

109. *Id.* (emphasis added).

110. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 296 (1976).

111. See J. TEN BROEK, *supra* note 90, at 179. Moreover, in addition to combatting state imposed discrimination in the form of the notorious Black Codes, the Civil Rights Act was also designed to combat private discrimination. See *Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 429 (1968).

112. Section 1 of the Civil Rights Act of 1866. Cong. Globe, 39th Cong., 1st Sess. 211 (1866).

113. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

114. The legislative history is replete with references to the fact that one purpose of the fourteenth amendment was to insure the constitutionality of § 1 of the Civil Rights Act. Cong. Globe, 39th Cong., 1st Sess. 2462, 2467, 2468, 2498, 2501, 2590, 2511, 2534, 2538, 2539, 2549, 2961, 3031. It is beyond doubt that the fourteenth amendment was designed to insure the constitutionality of the Civil Rights Act. See J. TEN BROEK, *supra* note 90, at 201.

115. See J. TEN BROEK, *supra* note 90, at 202.

116. *Id.* at 225.

can shake it and no cloud can obscure it.¹¹⁷

Shortly thereafter, the fifteenth amendment was passed by Congress and enacted by the states in order to guarantee the right to vote regardless of race or color.¹¹⁸

Following ratification of the fourteenth and fifteenth amendments, Congress passed the Enforcement Act of 1870 which essentially reenacted the 1866 statute.¹¹⁹ While Section 16 of the Act closely paralleled the wording of Section 1 of the Civil Rights Act, it significantly broadened the scope of protection. The word "citizens" was changed to "all persons" to insure that Chinese aliens as well as other aliens who emigrated to the United States would receive the protection of the Act.¹²⁰ The Supreme Court has concluded that the 1870 change in language from "citizens, of every race and color" to "persons within the jurisdiction of the United States" did not signify an intent to make the statute any less applicable to persons of every race, color and nationality.¹²¹ Section 16 of the Enforcement Act of 1870 was revised and recodified in 1874, when Section 1981 appeared in its current form.¹²² Section 18 of the Enforcement Act reenacted the entire Civil Rights Act of 1866.¹²³

The broad principles articulated by the 39th Congress indicate that Congress, in using the words race and color, did not mean to limit the Act's protection to any particular scientific concept or to an anthropologically defined race.¹²⁴ Neither the Act nor the legislative history contain any definition of the word "race". Rather, the legislative history suggests that Congress' purpose "was to ensure that all persons be treated equally, without regard to color or race, which . . . embrace[s], at the least, membership in a group that is ethnically and physiognomically distinctive."¹²⁵

THE SOCIOLOGICAL AND ANTHROPOLOGICAL VIEW OF RACE

The threshold issue that must be resolved in determining the scope of Section 1981 protection concerns the appropriate definition of the word

117. Cong. Globe, 39th Cong., 1st Sess. 2462 (1866).

118. Cong. Globe, 40th Cong., 3rd Sess. 1641 (1869).

119. Act of May 31, 1870, ch. 114, 16 Stat. 140-46. The Enforcement Act of 1870 also eliminated language regarding the right to inherit, buy and transfer property free from discrimination. See Comment, *Developments in the Law-Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29, 58-59 (1980).

120. Cong. Globe, 41st Cong., 2d Sess. 3658 (1870).

121. *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898).

122. Sections 1977 and 1978 of the Revised Statutes of 1874.

123. In 1871, additional civil rights protections were enacted under the rubric of the Ku Klux Klan Act. Ku Klux Klan Act, ch. 22, 17 Stat. 13-15 (1871). Section 1 of that Act, currently codified at 42 U.S.C. § 1983 (1982), created a cause of action for deprivations, under color of state law, of rights secured by the Constitution or laws of the United States. Section 2 of the Ku Klux Klan Act, currently codified at 42 U.S.C. § 1985, provided, *inter alia*, criminal and civil liability for conspiracies to deprive persons of the equal protection of the law or of equal privileges and immunities under the law.

The passage of the Civil Rights Act of 1875, which prohibited racial discrimination in places of public accommodation, constituted the final piece of major civil rights legislation of the nineteenth century. Ch. 114, 18 Stat. 335 (1875).

124. *Al-Khazraji v. Saint Francis College*, 784 F.2d 505 (3d Cir. 1986), *cert. granted*, 107 S. Ct. 62 (1986).

125. *Id.* at 517.

"race", which unquestionably contains "many levels of meaning, scientific, administrative and popular."¹²⁶

A simplistic, but nonetheless illuminating, answer can be found by merely resorting to dictionaries to see how the term is defined. Indeed, the Supreme Court has suggested that the term be defined by resort to the common perception of the word.¹²⁷ A dictionary approach was, in fact, utilized in *LaFore v. Emblem Tape and Label Co.*¹²⁸ where the court discovered the changeable nature of racial classifications from the *Encyclopedia Britannica* which currently lists nine races, with the possibility of a tenth.¹²⁹ The court in *Trejan v. IBM Corp.*,¹³⁰ noting the "disagreement among scholars . . . making racial categories and distinctions . . . a difficult process," used *Webster's Third New International Dictionary* and the *Columbia Encyclopedia* to determine that a brown skinned Indian plaintiff, actually a member of the white race, would have to demonstrate that he "is not of the white race" in order to claim discrimination within the purview of Section 1981.¹³¹

Similarly, the court in *Ortiz v. Bank of America*¹³² concluded from an analysis of dictionary definitions that a common meaning of the term race simply does not exist. Rather, "the dictionary demonstrates that the notion of race is as variable as man's prejudice."¹³³ Typically, dictionaries contain a variety of definitions of the term race, with one dictionary listing as many as thirteen definitions.¹³⁴

The definition of race found in *Black's Law Dictionary* reflects the confusion between concepts of race, ethnicity and minority status:

An ethnical stock; a great division of mankind having in common certain distinguishing physical peculiarities constituting a comprehensive class appearing to be derived from a distinct primitive source. A tribal

126. G. SIMPSON & J. YINGER, *RACIAL AND CULTURAL MINORITIES: AN ANALYSIS OF PREJUDICE AND DISCRIMINATION* 27 (1985).

127. See *infra* note 276.

128. 448 F. Supp. 824 (D. Colo. 1978).

129. *Id.*

130. 24 Fair Empl. Prac. Cas. (BNA) 443 (S.D.N.Y. 1980).

131. *Id.* at 445.

132. 547 F. Supp. 550 (E.D. Cal. 1982).

133. *Id.* at 566-67.

134. THE AMERICAN COLLEGE DICTIONARY defines race as follows:

1. a group of persons connected by common descent, blood or heredity. 2. a population so connected. 3. Ethno. a subdivision of a stock, characterized by a more or less unique combination of physical traits which are transmitted in descent. 4. a group of tribes or peoples forming an ethnic stock. 5. the state of belonging to an ethnic stock. 6. the distinguishing characteristics of special ethnic stocks. 7. the human race or family, or mankind. 8. Zool. a variety; a subspecies. 9. a natural kind of living creature; the human race, the race of fishes. 10. any group, class or kind, esp. of persons. 11. lofty or noble extraction or lineage. 12. (of speech, writing, etc.) characteristic quality, esp. liveliness or piquancy. 13. the characteristic taste or flavor of wine.

-Syn. 1. RACE, NATION, PEOPLE are terms for a large body of persons who may be thought of as a unit because of common characteristics. RACE refers to a large body of persons, animals or plants characterized by community of descent: the white race. NATION considers a body of persons as living under an organized government, occupying a fixed area, and dealing as a unit in matters of peace and war with other similar groups: the English nation. Whereas RACE and NATION are objective, PEOPLE has emotional connotations similar to those of family. PEOPLE refers to the persons composing a race, nation, tribe, etc. as members of a body with common interests and a unifying culture: we are one people, any people on any continent, the peoples of the world.

or national stock, a division or subdivision of one of the great racial stocks of mankind distinguished by minor peculiarities.¹³⁵

Significantly, a more sophisticated review of the scholarly sociological and anthropological treatises produces similar and equally unsatisfactory answers. Ashley Montagu, in his classic *Statement of Race*, opines that "for all practical purposes, race is not so much a biological phenomenon as a social myth."¹³⁶ Professor James King similarly notes that:

What constitutes a race is a matter of social definition. Whatever a group accepts as part of itself is within the pale; what it rejects is outside.

* * * *

. . . [W]hat constitutes a race and how one recognizes a racial difference are culturally determined. Whether two individuals regard themselves as of the same or of different races depends not on the degree of similarity of their genetic material but on whether history, tradition, and personal training and experiences have brought them to regard themselves as belonging to the same group or to different groups. *Since all human beings are of one species and since all populations tend to merge when they exist in contact, group differentiation will be based on cultural behavior and not on genetic differences.*¹³⁷

Others have characterized racial stereotyping as racial mythology perpetuated by folk images.¹³⁸ Professor of Anthropology Henry P. Lundsgaarde has stated that "[l]ay conceptions of race and ethnicity, which are not substantially different from those held by many members of the legal profession, have nothing in common with anthropological conceptions of race and ethnicity. The confusion is so great that anthropologists have gone so far as to recommend the elimination of the word 'race' from the English language."¹³⁹

The dynamic, non-static nature of races is also emphasized in the scientific literature: "To delimit a 'race' is akin to the attempt to freeze a moving stream at a given moment of time."¹⁴⁰ This has been reflected in the practice of federal agencies, such as the Office of Federal Procurement Policy and the EEOC, repeatedly changing their officially designated racial categories.¹⁴¹ The EEOC, for example, has been criticized for changing the race of a given plaintiff during the course of litigation "by the stroke of its administrative pen."¹⁴²

Moreover, the sociological and anthropological classification systems vary tremendously, with one system listing as few as three races and another

135. BLACK'S LAW DICTIONARY, 1423 (4th ed. 1951).

136. A. MONTAGU, STATEMENT ON RACE 3d Ed., 10 (1972).

137. J. KING, THE BIOLOGY OF RACE, 155-157 (1981).

138. Lundsgaarde, *Racial and Ethnic Classifications: An Appraisal of the Role of Anthropology in the Lawmaking Process*, 10 HOUS. L. REV. 651 (1973).

139. *Id.* at 643.

140. See A. MONTAGU, *supra* note 136, at 32.

141. *Racial Classification in Employment Discrimination Cases: The Fifth Circuit's Refusal to Prescribe Standards*, 11 CUMB. L. REV. 347, 366 (1980).

142. *Id.* at 363, referring to *Craig v. Alabama State Univ.*, 451 F. Supp. 1207 (M.D. Ala. 1978), *aff'd*, 614 F.2d 1295 (5th Cir. 1980), *cert. denied*, 449 U.S. 862 (1980).

listing over one hundred.¹⁴³ Some systems classify by head shape, others by blood-group gene frequencies, still others by hair form or skin color.¹⁴⁴ Blumenthal's 1795 classification containing five "varieties" of mankind dominated thought for close to two centuries.¹⁴⁵ In 1950, scientists listed thirty races; in 1962 one scientist found thirty-four while another found five (but not the same five belonging to Blumenthal's list.)¹⁴⁶ One group of scientists, after classifying thirty racial types, noted that the list might have been ten or fifty because the act of classifying races is itself arbitrary.¹⁴⁷ It is now generally acknowledged that, in light of the tremendous variations in the systems of classification, it is exceedingly unlikely that there will ever be one accepted classification of human races.¹⁴⁸ As a result of these wide deviations, Montagu cautions that ". . . we must be careful not to take [our classifications] too seriously. The danger we must avoid is becoming either the caretaker or the captives of our own arbitrary classification schemes."¹⁴⁹

Anthropologists tend to agree that determining what constitutes a race is made particularly difficult because "one's classification usually depends on the purpose of the classification."¹⁵⁰ Professor King has noted that

what sophisticated scientific classifiers recognize is determined by the aim of their classification and the convenience of applying it Since there are no objective boundaries to set off one subspecies from another like the objective boundaries between different species, the manner in which one classifies human populations will be determined by one's tastes and predilections and by the purpose of the classification.¹⁵¹

This has prompted one court to conclude that "to the extent that science has an answer to the question of what is meant by race, it is only in terms of the further question: tell me why you are classifying."¹⁵²

143. *Racial Classification*, *supra* note 141.

144. *Id.*

145. *See* J. KING, *supra* note 137, at 152.

146. *Id.*

147. C. COON, S. GARN AND J. BIRDSSELL, *RACES: A STUDY OF THE PROBLEMS OF RACE FORMATION IN MAN* 140 (1950).

148. *See* G. SIMPSON & J. YINGER, *supra* note 126, at 31.

149. *See* A. MONTAGU, *supra* note 136, at 33.

150. S. MOLNAR, *RACES, TYPES AND ETHNIC GROUPS* 13 (1975).

151. *See* J. KING, *supra* note 137, at 157.

152. *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 566 (E.D. Cal. 1982). Usually, the purpose of legal definitions of race is to provide the "groundwork for persecution or exclusion." R. GOLDSBY, *RACE & RACES* 8 (1971). Professor Goldsby points not just to the anti-Semitic racial laws in Nazi Germany but to this country's miscegenation laws. Missouri law, for example, made it a felony for a white to marry a Negro who was defined as a "person having 1/8 part or more of Negro blood." Arkansas made it a misdemeanor for a white to marry "any person who has in his or her veins any Negro blood whatever." And Tennessee made it a felony for whites to marry Africans or descendants of Africans. These statutes bear similarities to the first regulation of the Reich Citizenship Law which provided the following definition of membership in the Jewish race:

A Jew is anyone who descended from at least three grandparents who were racially fully Jews. A Jew is also one who descended from two full Jewish parents if (a) he belonged to the Jewish religious community at the time this law was issued or he joined the community later; (b) he was married to a Jewish person at the time this law was issued or married one subsequently; (c) he is the offspring from marriage with a Jew contracted after the law for the protection of German Blood and German Honor became effective; (d) he is the offspring of an extramarital relationship with a Jew and was born out of wedlock.

Id. at 6-7.

In addition, many scholars and scientists have stated that "the notion of race is a taxonomic device [that] exists in the human mind and not as a division in the objective universe."¹⁵³ Montagu's exposition of UNESCO's statements on race emphasizes that "to most people, a race is any group of people whom they choose to describe as a race."¹⁵⁴ Thus, "the social definition and not the biological facts actually determines the status of an individual and his place in interracial relations . . . [T]he scientific concept of race is totally inapplicable at the very spots where we recognize 'race problems.'"¹⁵⁵ The social as opposed to the scientific concept of race is typically reflected in the administration of government programs and in the college selection process where self-definitions of race or ethnicity control.¹⁵⁶ Similarly, the Office of Federal Statistical Policy, in a 1978 directive to federal agencies, instructed them to use "the category which most closely reflects the individual's recognition in his community."¹⁵⁷ The EEOC, in its list of "race/ethnic" categories, promulgated to assist employers in record-keeping, emphasizes ethnicity and nationality, not anthropological norms or other scientific racial designations.¹⁵⁸ Moreover, EEOC guidelines suggest that an employee be placed in categories where he or she "appears to belong or is regarded in the community as belonging."¹⁵⁹

The scientific literature clearly acknowledges that racial typology has been taken far less seriously in the last few decades, leading one scholar to refer to the racial-type game as pure "make believe"¹⁶⁰ and another commentator to refer to the ". . . classification of Americans into different racial categories as scientifically meaningless."¹⁶¹ A graphic example of this fantasy quality is apparent from the following excerpt reported in the New York Times:

Pretoria, South Africa—

The Supreme Court here today upheld the classification of 11 year old Sandra Laing as colored (mixed race) although her parents and their other children are all classified as whites. Sandra was reclassified colored by the Race Classification Board in February last year. She was said by South African officials to be a genetic throwback, showing strong nonwhite characteristics.

Dismissing an application by her father, Abraham Laing, for Sandra to be classified as white, Justice Oscar Galgut said the girl might still become white under legislation now before parliament that would make descent, rather than appearance and general acceptance, the standard for race classification.¹⁶²

153. *Ortiz*, 547 F. Supp. at 565.

154. *See* A. MONTAGUE, *supra* note 136, at 98.

155. G. MYRDAL, *AN AMERICAN DILEMMA* 115 (1944).

156. *See* G. SIMPSON & J. YINGER, *supra* note 126, at 28-29.

157. *Id.* at 28.

158. *Racial Classification in Employment Discrimination Cases: The Fifth Circuit's Refusal to Prescribe Standards*, 11 CUMB. L. REV. 347, 355 (1980).

159. EEOC, Standard Form 100, Employer Information Booklet, Race/Ethnic Identification 5 (1976).

160. *See* J. KING, *supra* note 137.

161. *See* Lundsgaarde, *supra* note 138, at 653.

162. *Id.* citing N.Y. Times, May 3, 1967, Reuters dispatch.

Similar "make believe" is apparent in several of the American court decisions which have rejected claims asserted under Section 1981, with one court suggesting that a white dark-skinned Indian should amend his complaint to restate his color¹⁶³ and another court dismissing a claim by a black plaintiff of African descent because the EEOC listed him as Caucasian.¹⁶⁴ And how would a court treat the one in every 20,000 births of American black parents which produce a child lacking in pigment?¹⁶⁵ While that child is racially black, if one looks to other inherited indicators such as fingerprint patterns and body structure, the child's color certainly appears white.¹⁶⁶

Moreover, it is unlikely that advances in science will prove helpful. Stephen Molnar suggests that "[w]ith the newer techniques of taxonomy which utilize computer facilities investigators can process thousands of items of information But rather than clarifying and establishing definite boundaries between populations, this additional information raises new questions and often casts doubt on the validity of many older, accepted taxonomic units."¹⁶⁷

Finally, the scientific literature reinforces, rather than undermines, the often indivisible link between race and national origin. Thus, the role of geography and culture play a prominent part in efforts to define the term race. "The definitions . . . though they appear quite diverse, have in common certain factors that they emphasize. The first is an assumption about the role of geographic distribution in race formation. Primarily, the divisions are based on the sharing of a common territory or point in space"¹⁶⁸ Further, "phenotypic differences are by no means necessary for the development of human tension, strife, cruelty and slaughter. Culture plays the major role in determining how human beings judge and react to one another. It is culture, not genotype, that leads one population to attempt to kill off another that it considers racially different."¹⁶⁹

The relevant literature thus clearly establishes a merging of the lines between race, ethnicity and national origin. The *Harvard Encyclopedia of American Ethnic Groups* has purposefully blurred the distinction between race and ethnicity.¹⁷⁰ An ethnic group has been described as "different from others in the society in some combination of the following characteristics: language, religion, ancestral homeland with its related culture, and race."¹⁷¹ Ethnocentricity has been described as "the belief or attitude that one's own customs and traditions are superior to those of other people. Ethnocentricity merges with racism when people assume that their alleged cultural superiority rests on their particular biological heritage."¹⁷²

The same overlap is apparent when one studies American immigration

163. *Trejan v. IBM Corp.*, 24 Fair Empl. Prac. Cas. (BNA) 443 (S.D.N.Y. 1980).

164. *Shah v. Mt. Zion Hosp. & Medical Center*, 642 F.2d 268 (9th Cir. 1981).

165. R. GOLDSBY, *RACE & RACES*, 22-23 (1971).

166. *Id.*

167. See S. MOLNAR, *supra* note 150, at 95.

168. *Id.* at 14.

169. See J. KING, *supra* note 137, at 158.

170. S. THERNSTROM, *HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS*, 1980.

171. See G. SIMPSON & J. YINGER, *supra* note 126, at 11.

172. See Lundsgaarde, *supra* note 138, at 641.

laws which were justified in "racial" or "biological" terms to connote a certain inferiority. More often than not the laws were actually applied to persons of the same race, but of different ancestry or ethnicity.¹⁷³

This review of the relevant scientific literature leads unquestionably to the conclusion that courts cannot be guided by science in attempting to define the scope of Section 1981's protection. The literature indicates that there is no agreement among anthropologists and sociologists about what constitutes a race, how many races exist, and on what basis classifications should be drawn. What agreement does exist reflects a recognition that races change, that they are defined culturally and geographically, and that "the notion of race is as variable as man's prejudice."¹⁷⁴

JUDICIAL INTERPRETATION OF THE SCOPE OF SECTION 1981 PROTECTION

The scientific imprecision of the concept of race coupled with the lack of guidance, to date, to be found in the Supreme Court's judicial pronouncements concerning the appropriate scope of Section 1981, has led the lower federal courts to produce widely disparate interpretations of the racial character of the Act.

The most restrictive interpretation categorically rejects any claim of discrimination based on ethnicity or national origin, even when the plaintiff asserts that the discrimination resulted in part because of skin color. Thus, some courts have held that Section 1981 does not protect an Iraqi whose claim of national origin discrimination did not allege racial animus;¹⁷⁵ Hispanics, Mexican Americans, Puerto Ricans and Spanish-surnamed Americans alleging national origin discrimination;¹⁷⁶ a Ukrainian born naturalized American citizen because Ukrainians are not considered a separate race;¹⁷⁷ an ethnic Arab born in Egypt because Egyptians are not considered a separate race;¹⁷⁸ a dark skinned Indian because the discrimination was motivated by plaintiff's nationality, not his color;¹⁷⁹ an Italian;¹⁸⁰ an Arabian who alleged he was a non-Caucasian;¹⁸¹ members of a Jewish congregation alleging discrimination by defendants who perceived Jews as members of a separate race;¹⁸² and a black East Indian of African descent because the EEOC listed

173. See G. SIMPSON & J. YINGER, *supra* note 126, at 50 *et seq.*

174. *Thomas v. Rohner-Gehrig*, 582 F. Supp. 669 (N.D. Ill. 1984).

175. *Anooya v. Hilton Hotels Corp.*, 733 F.2d 48 (7th Cir. 1984).

176. *Davis v. Boyle Midway*, 615 F. Supp. 560 (N.D. Ga. 1985); *Martinez v. Bethlehem Steel Corp.*, 78 F.R.D. 125 (E.D. Pa. 1978); *Plummer v. Chicago Journeyman Plumbers*, 452 F. Supp. 1127 (N.D. Ill. 1978), *rev'd on other grounds*, 657 F.2d 890 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1710 (1982); *Vera v. Bethlehem Steel Corp.*, 448 F. Supp. 610 (M.D. Pa. 1978); *National Ass'n of Gov't Employees v. Rumsfeld*, 556 F.2d 76 (D.C. Cir. 1977); *Vazquez v. Werner Continental*, 429 F. Supp. 513 (N.D. Ill. 1977); *Gradillas v. Hughes Aircraft*, 407 F. Supp. 865 (D. Ariz. 1975); *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1 (E.D. Pa. 1975).

177. *Kurylas v. United States Dept. of Agriculture*, 514 F.2d 894 (D.C. Cir. 1975); *Hiduchenko v. Minneapolis Medical and Diagnostic Center*, 467 F. Supp. 103 (D. Minn. 1979).

178. *Ibrahim v. NYS Dept. of Health*, 581 F. Supp. 228 (E.D.N.Y. 1984).

179. *Patel v. Holley House Hotels*, 483 F. Supp. 374 (S.D. Ala. 1979).

180. *Petrone v. City of Reading*, 541 F. Supp. 735 (E.D. Pa. 1982).

181. *Saad v. Burns Int'l Security Services*, 456 F. Supp. 33 (D.D.C. 1978).

182. *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 62 (1986).

him as Caucasian.¹⁸³

Cases falling into this category generally speak in conclusory terms, deciding whether a given plaintiff can claim the protection of Section 1981 by determining whether or not that plaintiff belongs to a different race than the defendants. These cases typically do not analyze or define the term "race" but rather assume a distinction of real significance between race and national origin or ethnicity.

A slightly less restrictive group of cases hold that claims of national origin discrimination survive a motion to dismiss but must be followed by proof that the discrimination was actually based on race rather than on national origin. Included in this category are cases denying a motion to dismiss a claim by a Syrian referred to as a "camel jockey" by defendants;¹⁸⁴ by a non-Caucasian Indian;¹⁸⁵ by a Cuban born naturalized American citizen;¹⁸⁶ and by Puerto Ricans and Hispanics.¹⁸⁷ A related group of cases grants leave to amend the complaint so that claims of national discrimination can be redrafted to allege racial discrimination.¹⁸⁸

While these cases at least recognize the difficulty of distinguishing between national origin and race, they nevertheless "place the burden on plaintiff to prove that the alleged discrimination was of a 'racial character'" without attempting "to define the term 'racial' or to distinguish in any principled way that term from 'national origin.'" ¹⁸⁹

The most expansive reading of Section 1981 can be found in cases that afford protection to members of groups who suffer discrimination because they are perceived by the defendants, correctly or incorrectly, to be separate and distinct from whites. Courts adopting this analysis point to the elusive nature of the distinction between national origin and race and refuse to be bound by rigid anthropological classifications. Rather, Section 1981 protection is extended to groups who suffer the same type of discrimination historically suffered by blacks. This analysis has led some courts to entertain Section 1981 claims brought by an Arabian born in Iraq;¹⁹⁰ by an Iranian despite the fact that taxonomically he was a Caucasian;¹⁹¹ by Mexican Americans because Hispanics are frequently identified as nonwhites even though anthropologists consider them Caucasians;¹⁹² by Puerto Ricans, His-

183. *Shah v. Mt. Zion Hosp. and Medical Center*, 642 F.2d 268 (9th Cir. 1981).

184. *Abdulrahim v. Gene B. Glick Co.*, 612 F. Supp. 256 (D.C. Ind. 1985).

185. *Anadam v. Fort Wayne Community Schools*, 19 Fair Empl. Prac. Cas. (BNA) 773 (N.D. Ind. 1978).

186. *Cubas v. Rapid Am. Corp.*, 420 F. Supp. 663 (E.D. Pa. 1976).

187. *Gonzalez v. Stanford Applied Eng'g*, 597 F.2d 1298 (9th Cir. 1979); *Garcia v. Gardners Nurseries*, 585 F. Supp. 369 (D. Conn. 1984); *Pollard v. City of Hartford*, 539 F. Supp. 1156 (D. Conn. 1982); *Lopez v. Sears*, 493 F. Supp. 801 (D. Md. 1980).

188. *Doe v. St. Joseph's Hosp.*, 788 F.2d 411 (7th Cir. 1986); *Carrillo v. Illinois Bell Tel. Co.*, 538 F. Supp. 793 (N.D. Ill. 1982); *Trejan v. IBM Corp.*, 24 Fair Empl. Prac. Cas. (BNA) 443 (S.D.N.Y. 1980); *Apodaca v. General Electric Co.*, 445 F. Supp. 821 (D.N.M. 1978); *Martinez v. Hazelton Research Animals*, 430 F. Supp. 186 (D. Md. 1977).

189. *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 562 (E.D. Cal. 1982).

190. *Al-Khazraji v. St. Francis College*, 784 F.2d 505 (3rd Cir. 1986), *cert. granted*, 107 S. Ct. 62 (1986).

191. *Alizadeh v. Safeway Stores, Inc.*, 802 F.2d 111 (5th Cir. 1986).

192. *Garcia v. Rush Presbyterian*, 660 F.2d 1217 (7th Cir. 1981); *Manzanares v. Safeway Stores*, 593 F.2d 968 (10th Cir. 1979); *Madrigal v. Certainteed Corp.*, 508 F. Supp. 310 (W.D. Mo. 1981);

panics and Indians because they are traditionally victims of group discrimination;¹⁹³ by an East Indian because rigid racial classifications have a doubtful scientific basis and are subject to continuous change over time;¹⁹⁴ by a Pakistani-American because of the questionable "jurisprudential wisdom of distinguishing between discrimination on the basis of race and on the basis of national origin";¹⁹⁵ by an Indian because Section 1981 "ought to be read to proscribe discrimination on the basis of national origin, unless a clear Congressional purpose to exclude such discrimination can be shown";¹⁹⁶ and by an Iranian because of membership in a group perceived to be racially different regardless of objective racial criteria.¹⁹⁷

The Tenth Circuit is generally credited with taking the lead in this line of cases advocating an expansive approach to Section 1981.¹⁹⁸ In *Manzanares v. Safeway Stores*,¹⁹⁹ the court held that the Supreme Court's references to "racial" discrimination in Section 1981 cases did not incorporate a technical, scientific definition of race. Rather, the court observed:

If 'white citizens' means a race, which technically does not seem particularly clear, it would seem that a group which is discriminated against because they are somehow different as compared to 'white citizens' is within the scope of section 1981. We cannot consider this as a 'national origin' case and that alone. Prejudice is as irrational as is the selection of groups against whom it is directed. It is thus a matter of practice or attitude in the community, it is usage or image based on all the mistaken concepts of 'race.' . . . It is sufficient for our purposes that as a matter of common knowledge, and as described in the opinions, a prejudice as alleged in this complaint does exist. It is directed against persons with spanish surnames. It is a group whose rights can be measured against the standard control group referred to in section 1981.²⁰⁰

This approach of identifying whether a plaintiff is a member of a group perceived to be distinguished from white citizens was also adopted in *Ortiz v. Bank of America*.²⁰¹ In that case a Federal District Court rejected the vari-

Aponte v. National Steel Service Center, 500 F. Supp. 198 (N.D. Ill. 1980); *Cervantes v. Dobson Constr. Co.*, 19 Empl. Prac. Dec. (CCH) ¶ 8979 (D. Neb. 1978); *LaFore v. Emblem Tape and Label Co.*, 448 F. Supp. 824 (D. Colo. 1978); *Enriquez v. Honeywell*, 431 F. Supp. 901 (W.D. Okla. 1977); *Ortega v. Merit Ins. Co.*, 433 F. Supp. 135 (N.D. Ill. 1977).

193. *Rodriguez v. Chandler*, 641 F. Supp. 1292, 1301 (S.D.N.Y. 1986) (Weinfeld, J.) (A claim by a Puerto Rican plaintiff is not subject to dismissal on the pleadings because "Section 1981 does not narrowly circumscribe the group it entitles to bring claims."); *Ramos v. Flagship International*, 612 F. Supp. 148 (E.D.N.Y. 1985); *Ortiz v. Bank of Am.*, 547 F. Supp. 550 (E.D. Cal. 1982); *Badillo v. Central Steel & Wire Co.*, 89 F.R.D. 140 (N.D. Ill. 1981); *Ridgeway v. International Bhd. of Electric Workers*, 466 F. Supp. 595 (N.D. Ill. 1979); *Puerto Rican Council v. Metromedia*, 10 Fair Empl. Prac. Cas. (BNA) 1009 (S.D.N.Y. 1975); *Maldonado v. Broadcast Plaza*, 10 Fair Empl. Prac. Cas. (BNA) 839 (D. Conn. 1974); *Miranda v. Clothing Workers Local 208*, 10 Fair Empl. Prac. Cas. (BNA) 557 (D.N.J. 1974).

194. *Banker v. Time Chemical*, 579 F. Supp. 1183 (N.D. Ill. 1983).

195. *Khawaja v. Wyatt*, 494 F. Supp. 302 (W.D.N.Y. 1980).

196. *Sud v. Import Motors Limited Inc.*, 379 F. Supp. 1064 (W.D. Mich. 1974).

197. *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365 (D.N.M. 1980).

198. See *Ramos v. Flagship Int'l, Inc.*, 612 F. Supp. 148, 151-52 (D.C.N.Y. 1985); *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 563 (E.D. Cal. 1982); *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1315, 1369 (D.N.M. 1980).

199. 593 F.2d 968 (10th Cir. 1979).

200. *Id.* at 971-72.

201. See *supra* note 132.

ous alternative approaches after extensively reviewing the legislative history of Section 1981 and the "scientific" literature on "race", and concluded that it is impossible to develop mutually exclusive definitions of race and national origin "which are other than purely arbitrary."²⁰²

Similarly, the court in *LaFore v. Emblem Tape and Label Co.*²⁰³ concluded that relying on technical definitions of race to determine coverage under the statute is too questionable and variable. The court cautioned that:

The use of racial classifications or distinctions in political or judicial functions is fraught with peril . . . Equating 'white citizens' with a racial classification is utterly lacking in sophistication. There is no scientific justification for the equation and its use inevitably leads to irretrievable confusion.

* * * *

Historically a class called 'white citizens' received more favorable treatment than other classes. If we understand the term 'white citizen' in the statute to mean that group which was most favored, the rule becomes understandable. All persons are entitled to the same rights and benefits as the most favored class.²⁰⁴

In perhaps the broadest statement of the permissible scope of the statute, the *LaFore* court concluded that if plaintiff can demonstrate "that an identifiable class of which he is not a member receives more favorable treatment than plaintiff because of that class distinction, then plaintiff is entitled to the protection of [Section] 1981."²⁰⁵

The most recent circuit court opinion to deal with this issue similarly adopts an expansive reading of the proper scope of the statute. In *Alizadeh v. Railway Express Agency*,²⁰⁶ the Fifth Circuit held that the protections of Section 1981 extend to an Iranian plaintiff despite the fact that he was classified as a Caucasian by anthropologists.²⁰⁷ The court noted that "[t]he mutability and indefiniteness of racial classifications make it difficult to distinguish between those racial groups the statute protects and those 'white citizens' with whom they are entitled to equality."²⁰⁸ The Fifth Circuit thus rejected the view that the statute requires the use of taxonomical definitions of race, finding that position unsupported by the legislative history of Section 1981 and inconsistent with the Supreme Court's pronouncement that the statute is not limited to non-whites.²⁰⁹ Instead, the court adopted the approach utilized in the Third Circuit which applies the Act's protections to those who are perceived to be non-white by those purportedly discriminating against them, due to "membership in a group that is ethnically and physiog-

202. *Id.* at 558 n.13. See also *Rodriguez v. Chandler*, 641 F. Supp. 1292, 1301 (S.D.N.Y. 1986) (Weinfeld, J.) (where the court referred to the "broad universe" protected by § 1981 which covers prejudice against Hispanics when it is indistinguishable from racism. The court further noted that the term "nonwhite" does not translate neatly into clearly racial or national origin terms.)

203. 448 F. Supp. 824 (D. Colo. 1978).

204. *Id.* at 826.

205. *Id.*

206. *Alizadeh v. Safeway Stores, Inc.*, 802 F.2d 111 (5th Cir. 1986).

207. *Id.*

208. *Id.*

209. *Id.*

nominically distinctive.”²¹⁰

An analysis of the two circuit court opinions which will be reviewed by the Supreme Court this term yields an interesting comparison and demonstrates rather graphically the sharp divergence of opinion within the federal courts. In *Shaare Tefila Congregation v. Cobb*,²¹¹ the Fourth Circuit held that section one of the Civil Rights Act of 1866 does not prohibit racially based discrimination leveled at members of a Jewish congregation because defendants merely misperceived Jews to be members of a separate race. In contrast, the Third Circuit, in *Al-Khazraji v. Saint Francis College*,²¹² held that ethnic Arabs “may depend upon Section 1981 to remedy past discrimination against them” regardless of whether anthropologically they are members of a distinct race.²¹³

The plaintiffs in *Shaare Tefila Congregation v. Cobb* were members of a Jewish synagogue which had been desecrated by defendants who stipulated that they viewed Jews as a separate and decidedly inferior race. There was no dispute that the nature of the discriminatory acts perpetrated by the defendants was racial in character. One of the defendants explained that the phrases and symbols used (“Dead Jew”, “Arian Brotherhood”, “KKK”, “In, Take a Shower Jew” and swastikas) would make Jews “uncomfortable” because “it’s an insult to your race.”²¹⁴ Depositions of defendants revealed that they ascribed to the view held by the Ku Klux Klan and the Nazis that Jews constitute a separate and inferior race.²¹⁵ While sharply disputing the characterization of Jews as a separate race, plaintiffs nonetheless claimed protection under Sections 1981 and 1982 because the discrimination they suffered was motivated and fueled by racial ignorance and prejudice.²¹⁶

The Fourth Circuit rejected plaintiffs’ claim, holding that Section 1982 is inapplicable to situations where “plaintiff is not a member of a racially distinct group but is merely *perceived* to be so by defendants.”²¹⁷ The court found that a contrary result “would permit charges of racial discrimination to arise out of nothing more than the subjective, irrational perceptions of defendants.”²¹⁸

In a separate opinion, concurring in part and dissenting in part, Judge Wilkinson sharply disputed the majority’s conclusion, noting that “all racial

210. *Id.* quoting from *Al-Khazraji v. St. Francis College*, 784 F.2d 505 (3d Cir. 1986), *cert. granted*, 107 S. Ct. 62 (1986).

211. 785 F.2d 523 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 62 (1986).

212. 784 F.2d 505 (3d Cir. 1986), *cert. granted*, 107 S. Ct. 62 (1986).

213. *Id.* at 514.

214. *Shaare Tefila*, 785 F.2d at 529.

215. *Id.* This type of misperception is clearly not limited to the defendants in *Shaare Tefila Congregation*. See *supra* text accompanying notes 126-74. Significantly, a recent New York Times article described similar misperceptions in the form of anti-racism laws recently enacted in Israel. New York Times, Nov. 13, 1986, at 4. The article described the Knesset enactment of an anti-Kahane bill banning anyone with a racist platform from running for the Knesset. This bill apparently reflected the Knesset’s belief that prejudice directed against Arabs by Jews is racial in character.

216. *Shaare Tefila*, 785 F.2d at 529.

217. *Id.* at 526. The Fourth Circuit’s holding addresses plaintiff’s Section 1982 claim because the Section 1981 claim was dismissed on other grounds. See *supra* note 7 and *infra* text accompanying notes 262-68.

218. *Id.* at 527.

prejudice is the result of subjective irrational perceptions, which drain individuals of their dignity because of their perceived equivalence as members of a racial group."²¹⁹ He further noted that "[m]isperception lies at the heart of prejudice, and the animus formed of such ignorance sows malice and hatred wherever it operates without restriction."²²⁰ Judge Wilkinson concluded that the discrimination suffered by the Jewish plaintiffs in this case was no different in character or consequence than the type of discrimination outlawed by the Civil Rights Act of 1866 which was enacted to halt the violence and hatred caused by precisely such misperceptions. Defendants' "misperceptions . . . result from the same catalyst for fear and violence that caused Congress to enact the Civil Rights Acts of 1866 and 1871."²²¹

Rejecting the scientific concepts of race as indefinite and unhelpful, Judge Wilkinson favored the approach utilized in *Ortiz v. Bank of America* which recognized that "the notion of race is a taxonomic device [that] exists in the human mind and not as a division in the objective universe."²²² Thus, "in construing statutes designed to eliminate racial prejudice we must confront the reality that the perceptions of individuals, rather than the measurements of science, define the scope of racial discrimination."²²³ While some courts have applied the common perception test to gauge whether a plaintiff is entitled to protection under Section 1981, Judge Wilkinson would go beyond that and allow a plaintiff to state a claim under the statute so long as it could be established that the particular defendants acted on the basis of racial perceptions, however inaccurate or unscientific or uncommon those perceptions might be. Adopting this subjective test, Judge Wilkinson argued, eliminates the need for courts to make judicial pronouncements as to what groups constitute a race, which itself could "serve to facilitate continued discrimination and postpone the day when all individuals will be addressed as such."²²⁴ Any contrary result operates "to blind ourselves as a nation to the real nature of race prejudice, and to leave American citizens open to the very deprivations of racial violence—the very acts against which Congress more than a century ago had sought to protect them".²²⁵

In a somewhat similar vein, the Third Circuit recently rejected the argument that Section 1981 must be construed with an eye towards the anthropological texts. In *Al-Khazraji v. Saint Francis College*,²²⁶ the court permitted an ethnic Arab born in Iraq to proceed under Section 1981 despite defendants' claim that Arabs are taxonomically Caucasians. After thoroughly reviewing the legislative history of Section 1981, the court concluded that Congress did not intend to limit the scope of beneficiaries of the Act to members of groups perceived by anthropologists to belong to designated races. Rather, "Congress' purpose was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at

219. *Id.* at 528 (Wilkinson, J., dissenting).

220. *Id.* at 529 (Wilkinson, J., dissenting).

221. *Id.* at 531 (Wilkinson, J., dissenting).

222. 547 F. Supp. 550 at 565.

223. *Shaare Tefila*, 785 F.2d at 532 (Wilkinson, J., dissenting).

224. *Id.* at 533 (Wilkinson, J., dissenting).

225. *Id.* at 534 (Wilkinson, J., dissenting).

226. 784 F.2d 505 (3d Cir. 1986) *cert. granted*, 107 S. Ct. 62 (1986).

the least, membership in a group that is ethnically and physiognomically distinctive."²²⁷

The Third Circuit thus held that Arabs could be the victims of racial prejudice because, as the Tenth Circuit has observed, "prejudice is as irrational as is the selection of groups against whom it is directed. It is thus a matter of practice or attitude in the community, it is a usage or image based on all the mistaken concepts of 'race.'"²²⁸ Despite this language, the court declined to adopt an approach that would ignore the distinction between national origin and race. While recognizing the obscurity of the distinction, the court nevertheless concluded that "discrimination based on race, seems at a minimum, to involve discrimination directed against an individual because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of homo sapiens."²²⁹

Judge Adams, in a concurring opinion, observed that the definition of "race" employed by the majority was more sensible than a strict anthropological definition.²³⁰ In fact, utilizing a strict "scientific" approach would result in the anomalous result that a white plaintiff could properly assert a claim under Section 1981, but a brown skinned Mexican American could not.²³¹ Judge Adams further noted, however, that while the majority refused to equate national origin discrimination with racial discrimination, application of the standard articulated by the majority was likely to lead to a tremendous expansion of the statute since almost any nationality can be seen as "ethnically and physiognomically distinctive."²³²

THE INTERPLAY BETWEEN NATIONAL ORIGIN, ETHNICITY AND RACE IN OTHER STATUTORY AND CONSTITUTIONAL CONTEXTS

In an attempt to resolve the issue of whether claims of ethnic or national origin discrimination ought to be cognizable under Section 1981, it is useful to look at the interplay between national origin, ethnicity and race in other contexts.

The most telling analogy can be drawn to the equal protection clause of the fourteenth amendment.²³³ The Supreme Court has repeatedly and con-

227. *Id.* at 517.

228. *Id.* quoting from *Manzanares v. Safeway Stores*, 593 F.2d 968, 971 (10th Cir. 1979).

229. *Al-Khazraji*, 784 F.2d at 517.

230. *Id.* at 520 (Adams, J., concurring).

231. *Id.*, (Adams, J., concurring).

232. *Id.*, (Adams, J., concurring).

233. Another useful comparison can be drawn to conspiracy claims asserted pursuant to 42 U.S.C. § 1985(3) (1982). This statute was derived from the Ku Klux Klan Act of 1871 which was enacted to "put force behind the Civil War Amendments by providing an avenue for the redress of injuries suffered by the class of newly emancipated slaves." *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977)(en banc). In order to assert a claim under § 1985(3), plaintiffs must demonstrate that: 1) defendants conspired, 2) for the purpose of depriving, either directly or indirectly, any person or class of persons, of equal protection of the laws or of equal privileges and immunities under the laws, 3) that defendants acted in furtherance of the conspiracy, and 4) that plaintiff was injured in person or property or deprived of having and exercising any right or privilege of a citizen of the United States. *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977)(en banc).

The Supreme Court has held that § 1985(3) is not a general federal tort law but rather covers "racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Griffin v. Brecken-*

sistently equated claims of national origin discrimination with claims of racial discrimination for purposes of equal protection analysis.²³⁴

As early as 1886, in *Yick Wo v. Hopkins*,²³⁵ the Court referred to the "universality" of the fourteenth amendment which applied "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."²³⁶ Significantly, the Court found the challenged ordinance violative of the equal protection clause because it evidenced a "hostility to the *race and nationality* to which the petitioners belong."²³⁷ Similarly, in *Truax v. Raich*,²³⁸ the Court equated racial discrimination with national origin discrimination and held that "[i]f the right to earn a living] could be refused solely upon the ground of race, or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words."²³⁹

In light of the Court's consistency in equating national origin discrimination with racial discrimination, it is not surprising that the Court has declared that nationality constitutes a suspect classification for purposes of equal protection analysis.²⁴⁰ Thus, in *Oyama v. California*,²⁴¹ the Court utilized strict scrutiny to invalidate a classification based on national origin because "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."²⁴²

Notably, in *Hernandez v. Texas*,²⁴³ the Court referred to the need, under the fourteenth amendment, to constantly re-examine society's prejudices to determine which groups require additional judicial protection:

Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. . . . The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon

ridge, 403 U.S. 88 (1971) While the parameters of § 1985(3) have yet to be set, courts have disallowed claims alleging conspiracies motivated by bias based on economic status, *United Bhd. of Carpenters & Joiners of Am., Local 610 v. Scott*, 463 U.S. 825 (1983); *Daigle v. Gulf State Util. Co., Local No 2286*, 794 F.2d 974 (5th Cir. 1986), claims alleging an anti-police bias, *Taylor v. Nichols*, 409 F. Supp. 927 (D. Kan. 1976), and claims asserting discrimination against bankrupts, *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (en banc).

At least one court has noted that § 1985(3) should be held to protect against discrimination based on national origin. *Arnold v. Tiffany*, 359 F. Supp. 1034, 1036 (C.D. Cal. 1973), *aff'd on other grounds*, 487 F.2d 216 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974).

234. *See supra* note 88.

235. 118 U.S. 356 (1886).

236. *Id.* at 369.

237. *Id.* at 374 (emphasis added.)

238. 239 U.S. 33 (1915).

239. *Id.* at 41.

240. *See supra* note 88.

241. 332 U.S. 633 (1948).

242. *Id.* at 646 (quoting *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943)).

243. 347 U.S. 475 (1954).

differences between 'white' and Negro.²⁴⁴

The Court applied this reasoning to hold that the equal protection clause forbids the exclusion of otherwise eligible persons from jury service "solely because of their ancestry or national origin."²⁴⁵ Similarly, in *Castenada v. Partida*,²⁴⁶ the Court held that Mexican-Americans are clearly a "recognizable, distinct class, singled out for different treatment under the laws, as written or as applied."²⁴⁷

The Court's willingness to equate nationality and race for purposes of the fourteenth amendment reflects the fact that both classifications share the traditional indicia of suspectness warranting judicial solicitude.²⁴⁸ The

244. *Id.* at 478.

245. *Id.* at 479.

246. 430 U.S. 482 (1977).

247. *Id.* at 494.

248. The term suspect classification is generally understood to refer to legislation of which we are suspicious because it seems likely to reflect stereotyped prejudice. The act of labeling a classification suspect reflects a concern about the effect of prejudice by the majority against historically despised groups in the majoritarian process and a fear of invidious discrimination by majoritarian domination. The result of categorizing a group suspect is the invocation of strict judicial scrutiny which, in this context, operates as an anti-majoritarian safeguard. See J. ELY, *DEMOCRACY AND DISTRUST* (1980).

Strict scrutiny has been characterized as "strict" in theory and "fatal" in fact. Gunther, *The Supreme Court, 1971 Term-Foreward: In Search of Evolving Doctrine on a Changing Court: a Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Only once has legislation that explicitly discriminated against a suspect category survived the strict scrutiny of the court. *Korematsu v. United States*, 323 U.S. 214 (1944). Thus, the designation of a classification as suspect is normally outcome determinative.

The traditional formulation of suspectness originated in Chief Justice Stone's now famous *Carolene Products* footnote, which refers to "prejudice against discrete and insular minorities" triggering heightened judicial review. *United States v. Carolene Prod.*, 304 U.S. 144, 152 n.4 (1938). This formulation has been expressed in contrasting, and often contradictory, fashion by the court. J. BAER, *EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT*, chapter 10, (1983).

One modern formulation of what makes a classification suspect was expressed in *Frontiero v. Richardson* where Justice Brennan, in his plurality opinion, emphasized two factors. 411 U.S. 677 (1973). According to Justice Brennan, the characteristic underlying the classification must be immutable and must bear no relationship to ability. 411 U.S. at 686.

A contrasting version of the formulation, and one apparently derived from the *Carolene Products* footnote, was expressed by Justice Powell in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). There, the Court identified the "traditional indicia of suspectness" as groups "... saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." 411 U.S. at 11.

While the Court has been less than consistent in identifying the factors that make a classification suspect, it has, on different occasions, pointed to six characteristics as bearing on the inquiry: 1) a history of unequal treatment (*San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)); 2) the immutability of the trait (*Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172, 176 (1972); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion)); 3) a discrete and insular minority (*United States v. Carolene Prod.*, 304 U.S. 144, 152 n.4 (1938); *Graham v. Richardson*, 403 U.S. 365, 372 (1971)); 4) political powerlessness (*San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. at 28); 5) a stereotype that causes stigma or opprobrium (*Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164 (1972)); and 6) a lack of relationship between the stereotyped characteristic and abilities (*Frontiero v. Richardson*, 411 U.S. 677 (1973)).

The factor most logically linked to suspectness is the requirement that there be a history of purposeful and unequal treatment. The fact that the government has historically discriminated against a particular group provides clear evidence of historical prejudice. Based on this history, it is reasonable for us to be particularly suspicious of modern laws that discriminate against a group that has long been the object of widespread and government vilification. In such cases, we are automatically suspicious that the legislature either has insufficient regard for the interests of this group to legislate impartially or has a conscious desire to injure members of this group. Thus, classifications

Supreme Court has noted that classifications based on race or national origin "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or as deserving as others."²⁴⁹ Since it is unlikely that the legislative process will correct such inequities, classifications based on race or national origin are subject to strict scrutiny, to be sustained only if they are suitably tailored to achieve a compelling state interest.²⁵⁰ Thus, in *Fullilove v. Klutznick*,²⁵¹ the Court emphasized that "any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees."²⁵²

The similarity between discrimination based on racial prejudice and discrimination based on ethnic prejudice was also noted in *Keyes v. School District #1, Denver, Colorado*.²⁵³ There, the Court pointed to the comparability in treatment suffered by Hispanics and blacks, and the "economic and cultural deprivation and discrimination" shared by both groups.²⁵⁴ After reviewing reports prepared by the United States Commission on Civil Rights as well as a number of studies documenting the ethnic isolation of Mexican Americans in the public schools, the Court concluded that there is "... agreement that, though of different origins, Negroes and Hispanos in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students."²⁵⁵

The Court has thus consistently equated claims of national origin or ethnic discrimination with claims of racial discrimination for purposes of the fourteenth amendment.²⁵⁶ In fact, in *Trimble v. Gordon*,²⁵⁷ Justice Rehnquist referred to national origin as the "first cousin" of race in his critique of the Court's willingness to expand its equal protection jurisprudence beyond discrimination based on race or national origin:

Except in the area of the law in which the Framers obviously meant it to apply—classifications based on race or national origin, the first cousin of race—the Court's decisions can fairly be described as an endless tinkering with legislative judgments, a series of conclusions unsup-

drawn on the basis of race or national origin can easily be considered suspect by reference to an indisputable history of discriminatory governmental treatment. See *Loving v. Virginia*, 388 U.S. 1 (1967); *Hernandez v. Texas*, 347 U.S. 475 (1954). This merely reflects the fact that the primary purpose of the fourteenth amendment was to prevent government endorsed discrimination based on race.

249. *City of Cleburne, Tex. v. Cleburne Living Center*, 105 S. Ct. 3249, 3255 (1985).

250. *Id.*

251. 448 U.S. 448 (1979).

252. *Id.* at 491.

253. 413 U.S. 189 (1972). In a Title VII context, see *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), where the court seemingly equates ethnic and racial discrimination and refers to a working environment "charged with ethnic or racial discrimination."

254. *Keyes*, 413 U.S. at 197-98.

255. *Id.* at 198.

256. See *Loving v. Virginia*, 388 U.S. 1, 11 (1966) ("Over the years, this Court has consistently repudiated 'distinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality,'" quoting *Hirabayashi v. United States*, 329 U.S. 81, 100 (1943)).

257. *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J. dissenting).

ported by any central guiding principle.²⁵⁸

Justice Rehnquist argues for an equal protection jurisprudence that asks how close the group seeking protection is to groups suffering discrimination based on race or national origin.²⁵⁹

The fact that race and national origin are equated for purposes of equal protection analysis is tremendously significant for purposes of Section 1981 analysis since the same Congress that enacted section one of the Civil Rights Act, the predecessor of Section 1981, also proposed and enacted the fourteenth amendment.²⁶⁰ The overriding Congressional purpose in passing the fourteenth amendment was to place the protections of the Civil Rights Act beyond the whims of subsequent Congressional majorities and secure it "in the eternal firmament of the Constitution."²⁶¹ Thus, the Court's treatment of discrimination based on national origin for purposes of the fourteenth amendment is exceedingly relevant to claims asserted under Section 1981.

An analogy can also be drawn to 42 U.S.C. Section 1982, which prohibits discrimination in the sale or rental of property, since this statute, like Section 1981, derives from Section 1 of the Civil Rights Act of 1866.²⁶² Indeed, the Supreme Court has noted that "in light of the historical interrelationship between § 1981 and § 1982 [there is] no reason to construe these sections differently when applied, on these facts . . ."²⁶³ Perhaps in light of their historical similarities, the analysis of the issue for purposes of Section 1982 has not deviated from the Section 1981 analysis.²⁶⁴

While a number of commentators and courts have casually referred to the Supreme Court's "holding" in *Jones v. Alfred H. Mayer* that claims of national origin discrimination are not cognizable under Section 1982, in fact the Court merely stated, in dictum, that the statute "deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin."²⁶⁵ The plaintiff in *Jones* was black and the Court had no occasion to analyze the issue any more than to describe the coverage as racial in character, without defining the term "race." One commentator has characterized the Court's language in *Jones* as "a response to the dissent's contention that the majority was creating a civil remedy for discrimination in housing which was wholly unnecessary since the recently enacted Fair Housing provisions of the Civil Rights Act of 1968, 42 U.S.C. Sections 3601 et seq. (1970) created just such a remedy."²⁶⁶ The issue before the Court in *Jones* was not what forms of discrimination were covered by

258. *Id.*

259. *Id.*

260. See *supra* text accompanying notes 114-17. See also *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) where the Court's analysis is grounded in both the language of the fourteenth amendment and the predecessor statute to § 1981.

261. See *supra* text accompanying note 117.

262. See *Jones v. Alfred H. Mayer*, 392 U.S. 409 (1968).

263. *Tillman v. Wheaton-Haven Recreational Association*, 410 U.S. 431, 440 (1973). *Accord Runyon v. McCrary*, 427 U.S. 160, 171 (1976).

264. See, e.g., *Shaare Tefila Congregation v. Cobb*, 785 F.2d 528 n.1.

265. *Jones v. Alfred H. Mayer*, 392 U.S. 409 at 413.

266. *Greenfield & Kates, Mexican Americans, Racial Discrimination and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662 (1975).

Section 1982 but rather whether the statute afforded a cause of action for wholly private acts of discrimination.

Moreover, while Sections 1981 and 1982 share historical antecedents, there are significant differences between the two statutes. First, Section 1982 covers discrimination only in the sale or leasing of property whereas Section 1981 covers discrimination affecting the full panoply of civil rights. Second, when section one of the Civil Rights Act of 1866 was reenacted in the Enforcement Act of 1870, the scope of Section 1981 was considerably broadened by adding aliens to the class of persons protected.²⁶⁷ In contrast, Section 1982 affords protection only to citizens.²⁶⁸

Because there has been virtually no independent analysis of the issue under Section 1982, and in light of the differences that exist between the statutes despite their shared historical origins, the decisional law arising under Section 1982 provides little insight into the issue of what constitutes racial discrimination for purposes of the statute.

CONCLUSION

In this writer's view, Section 1981 is properly understood as embracing discrimination based on national origin or ethnicity even when the discrimination is directed against individuals who do not technically fit within one of science's racial compartments.

The statute is certainly sufficiently capacious to cover individuals, like the Jewish plaintiffs in *Shaare Tefila Congregation v. Cobb*,²⁶⁹ who suffered blatant racial discrimination at the hands of those who believed that Jews were an inferior race. History has clearly demonstrated the racial basis of anti-Semitism which, "by the time of Hitler . . . had become thoroughly biologized."²⁷⁰ Indeed, among the tests used to determine the purity of German blood was the use of a pendulum as a divining rod to detect Jewish blood.²⁷¹ Since the discrimination in *Shaare Tefila* was undeniably generated by racial animus, it is precisely the type of conduct that the Act was designed to prohibit. The fact that the defendants were incorrect in their belief that plaintiffs constituted a separate race should not change the analysis in light of the intense subjectivity and ignorance typically involved in race prejudice, and in light of the lack of consistency, even among the leading scientists and anthropologists, concerning what actually constitutes a race.²⁷² If Section 1981 were construed to require that plaintiffs demonstrate the truth of defendants' discriminatory beliefs, the very purpose of the

267. See *supra* text accompanying notes 120-21.

268. Section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1982).

269. 785 F.2d 523 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 62 (1986).

270. *Id.* See also G. SIMPSON & J. YINGER, *supra* note 126, at 47.

271. R. GOLDSBY, *RACE & RACES* 7 (1971).

272. See also *Madrigal v. Certainteed Corp.*, 508 F. Supp. 310, 311 (W.D. Mo. 1981) (" . . . [Section] 1981 should be construed to offer protection to persons who are the objects of discrimination because prejudiced persons may perceive them to be nonwhite, even though such racial characterization may be unsound or debatable.")

statute would be turned on its head. As Judge Wilkinson observed in his dissent in *Shaare Tefila Congregation v. Cobb*:

One would think it preposterous to require that these beliefs be objectively true before federal law provides protection. To the contrary, it is precisely because such beliefs are false and reprehensible that federal civil rights laws were enacted. These laws provide redress for the harms suffered by misperceptions about the relevance of race as a basis for action in our society.²⁷³

Indeed, prejudice has been defined as a "misjudgment that one defends. When a preexisting attitude is so strong and inflexible that it seriously distorts perception and judgment, one has a prejudice."²⁷⁴ In a leading analysis of racial attitudes, the authors stress that it is a person's *perceptions* of racial differences that is an essential ingredient of racial prejudice.²⁷⁵

This formulation does not represent a departure from the Supreme Court's "racial" characterization of the proper scope of Section 1981. Rather, it merely attempts to define the word "racial" and, in so doing, rejects rigid and formalistic efforts which do not coincide with common perception²⁷⁶ and which, significantly, are rejected by the leading sociologists and anthropologists in the field.²⁷⁷

Properly understood, this formulation protects not only the Jewish plaintiffs suffering discrimination motivated by racial animus but also plaintiffs such as the Mexican Americans in *Erebia v. Chrysler Plastic Products Corp.*, who were told to ". . . go back to Mexico [because] there [is] some white person that could be doing [the] job instead of a Mexican."²⁷⁸ While the discrimination in that case is technically based on ancestry rather than on racial lines, the type of prejudice and bigotry expressed is impossible to distinguish from pure racial discrimination.²⁷⁹

An expansive view of what constitutes racial discrimination is consistent with the exceedingly broad language of the statute, reflects its legislative history which is replete with references to the universality of its application, and furthers the "noble purpose of Section 1981."²⁸⁰ As the Third Circuit

273. 785 F.2d at 530.

274. G. SIMPSON & J. YINGER, *supra* note 126, at 21-22.

275. R. APOSTLE, C. GLOCK, T. PIAZZA & M. SUELZLE, *THE ANATOMY OF RACIAL ATTITUDES* 1983.

276. See *United States v. Thind*, 261 U.S. 204, 209 (1923) where the Supreme Court, construing the term "white persons" stated:

It is in the popular sense of the word, therefore, that we employ it as an aid to the construction of the statute, for it would be obviously illogical to convert words of common speech used in a statute into words of scientific terminology when neither the latter nor the science for whose purposes they were coined was within the contemplation of the framers or of the people for whom it was framed. The words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken.

See also *In re Din*, 27 F.2d 568 (N.D. Cal. 1928) ("What ethnologists, anthropologists, and other so-called scientists may speculate and conjecture in respect to races and origins may interest the curious and convince the credulous, but it is of no moment in arriving at the intent of Congress in the statute aforesaid.").

277. See *supra* text accompanying notes 148-55.

278. 772 F.2d 1250, 1252 (6th Cir. 1985).

279. See G. SIMPSON & J. YINGER, *supra* note 126, at 185 *et seq.* for their discussion of Mexican Americans as one of three disadvantaged American minority groups.

280. *Garcia v. Gardner's Nurseries*, 585 F. Supp. 369, 375 (D. Conn. 1984).

stated:

. . . Congress did not intend to limit Section 1981 solely to those who could demonstrate that they had been discriminated against because they belonged to a particular group identified and described by anthropologists. When Congress referred in the statute to 'race,' it plainly did not intend thereby to refer courts to any particular scientific conception of the term. In fact, there is no precise definition of the word.

. . . Congress' purpose was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at the least, membership in a group that is ethnically and physiognomically distinctive.²⁸¹

The legislative history does not support a construction of Section 1981 that is frozen either in the scientific knowledge of the nineteenth century or in the forms of discrimination practiced at that time. Rather, the history supports a construction that applies the statute's protection to modern forms of racial discrimination, not specifically envisaged by the 39th Congress, but sufficiently analogous to the 19th century discrimination that the Act was designed to prohibit. The relevant question that must be addressed in cases where the racial boundaries are unclear is whether the plaintiff is a member of a group perceived to be distinguishable from groups recognized as white.²⁸²

Any alternative formulation involves the courts in the unseemly and itself discriminatory practice of drawing racial lines among people, for how is a court to determine whether a given plaintiff fits within a distinct race?²⁸³ As courts "strain to fit . . . grievances into the mold of racial discrimination . . . the courts may be forced into the business of attempting to identify the racial characteristics of given nationalities. This is precisely the kind of stereotyping which the Civil Rights statutes were designed to prevent."²⁸⁴

A country that is as unalterably pluralistic as this society is demands protection for its minorities.²⁸⁵ Section 1981 grew out of a recognition that hatred and bigotry could not be tolerated. The statute remains as an effective vehicle to redress modern day versions of nineteenth century discrimination.

281. *Al-Khazraji*, 784 F.2d at 516.

282. *See Ramos v. Flagship Int'l Inc.*, 612 F. Supp. 148, 151 (D.C.N.Y. 1985).

283. *See generally* *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890 (7th Cir. 1981).

284. *Khawaja v. Wyatt*, 494 F. Supp. 302, 305 n.1 (W.D.N.Y. 1980).

285. *See G. SIMPSON & J. YINGER*, *supra* note 126, at 18.